Tuesday, May 1
11:15 am - 12:20 pm

Structuring or Revamping Your Compliance Program

Ross Booher
Partner
Bass, Berry & Sims PLC

Devin House
AVP Director of Compliance
Flagship Credit Acceptance

Sozeen Mondlin
Associate General Counsel & Director of Compliance
The MITRE

Faculty Biographies

Ross Booher

Ross Booher is a partner with Bass, Berry & Sims PLC. He represents and counsels public and private companies regarding complex litigation, internal investigations and international and domestic trade practices. He also leads the firm's Foreign Anti-Corruption Compliance and Investigations team. Mr. Booher has extensive experience regarding FCPA/foreign anti-corruption compliance and international investigations and has led multiple international investigations, including in Asia, Africa and Europe. He has assisted clients with foreign acquisitions, joint ventures, expansions, global sourcing, implementing global compliance programs and in multiple lawsuits involving antitrust, trade practice and business tort claims.

Mr. Booher has conducted investigations in a variety of industries, including healthcare, manufacturing, consumer products and chemicals. He has investigated alleged FCPA violations, anticompetitive trade practices, mass casualty incidents, environmental breaches, fraud, and industrial accidents. Prior to entering private practice, he served overseas as a U.S. Navy prosecuting attorney and conducted sensitive criminal and national security investigations in foreign jurisdictions. As an active duty officer in the U.S. Navy Judge Advocate General's Corps, he served as a legal officer aboard the nuclear aircraft carrier USS George Washington, with NATO ground forces in Kosovo, as the judge advocate for a three warship Maritime Expeditionary Force sent to enforce U.N. sanctions against Iraq, and as a prosecuting attorney based in Japan.

Mr. Booher earned his undergraduate degree from Vanderbilt University. He graduated with highest honors from the University of Tennessee College of Law and was awarded the Dean’s Citation for Extraordinary Contributions to the College of Law.

Devin House

Devin House is director of compliance at Flagship Credit Acceptance, an indirect auto specialty finance company. In addition to management of the company's compliance program, he is responsible for litigation management, federal and state legislative and regulatory tracking and response, and overall legal risk reduction.

Mr. House estimates he has implemented or enhanced 13 compliance programs over the course of his career. He has worked with companies examined by or under investigation from the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Federal Trade Commission, and the Department of Education, as well as their equivalents at the state level. Earlier in his career Mr. House worked for other consumer financial service companies, providing compliance and legal advise to retail and commercial banks, mortgage lenders, student loan companies, credit card companies, third party collection agencies, and debt buyers.

Mr. House authored an essay for Mortgage Banking magazine (“The Need for the Nontraditional Mortgage"), as well as a “Model Group Defamation Statute,” published in Group Defamation and Freedom of Speech: The Relationship between Language and Violence (Greenwood Press 1995). He has also acted as reviewer for the American Bank Associations, The Bank Card Business, Second Edition. He is quoted in Investment Adviser Watch newsletter as saying a candy bowl is the Compliance Officer's secret weapon.

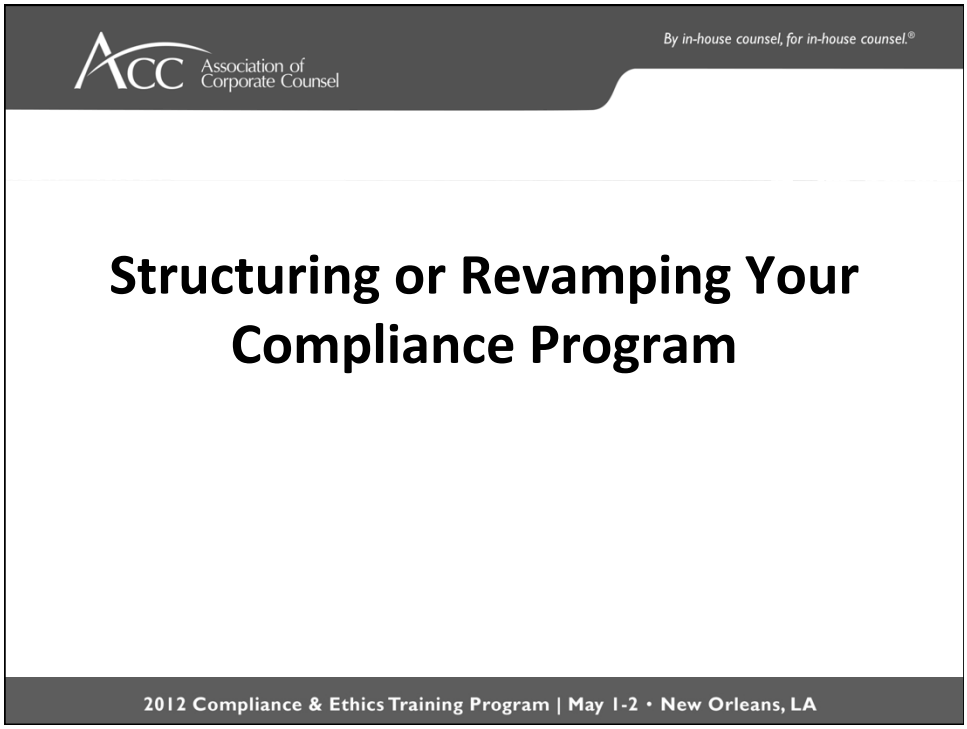
Mr. House earned his BA and JD from the University of Missouri - Kansas City.

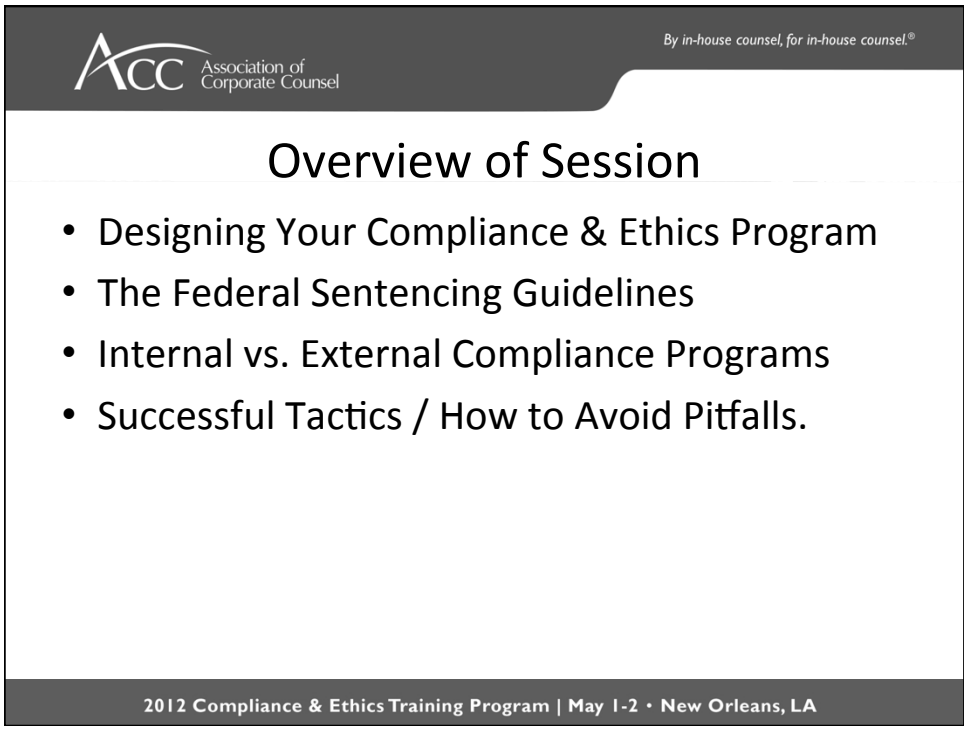
Sozeen J. Mondlin

Sozeen Mondlin is associate general counsel and director of compliance for The MITRE Corporation ("MITRE"). MITRE is a systems engineering and information technology company that works in the public interest on defense and intelligence, aviation system development, homeland security, and federal sector modernization.

Ms. Mondlin is responsible for MITRE's ethics and compliance program and is its first Director. She also is responsible for advising management on employment law and employee relations and for oversight of the company's litigation.

Ms. Mondlin is a graduate of Wellesley College and Stanford Law School.





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7 Elements of an Effective Compliance & Ethics Program

1. Written Compliance Program, adopted by Board/ Senior Management
2. Compliance Structure (Officer/Department/ Committee)
3. Compliance Training
4. Compliance Monitoring
5. Reporting
6. Controls
7. Remediation

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1. Written Compliance Program

- Adopted by the Board of Directors
- Written in Plain Language
- Reviewed and updated annually
- List 7 elements
- Includes list of laws/regulations

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2. Compliance Structure

- Compliance Officer
  - Full time vs. part time
- Compliance Department
- Compliance Committee(s)

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3. Compliance Training

- Mandatory vs. Recommended
- New Hire vs. Continuing
- On-line vs. Classroom vs. Staff Meetings
- Specific to job function
- Test knowledge and comprehension
- Report satisfactory completion
- Use monitoring to identify training needs

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4. Compliance Monitoring

- *Regular "walk-arounds"*
- *Continuous observation*
- *Audits*
- *Transactional Testing*
- *GAP Analysis*

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5. Reporting

- Hotlines/Whistleblowing
- Chain of Command Reporting up to Board
- Regular Reports to Board/Senior Management
- Complaints

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6. Controls

Focus on real-time prevention and detection

- Written Policies & Procedures
- Separation of duties

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7. Remediation

- Crisis Response

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Federal Sentencing Guidelines

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United States Sentencing Guidelines

The USSG provide the guidelines that apply to organizations convicted of a federal crime.

A pre-existing effective compliance program can entitle an organization to a three point reduction in its culpability score, potentially resulting in a significant reduction in financial consequences. *See* USSG § 8C2.5(f)(1).

The USSG provides guidance on the elements of an "effective compliance program." *See* USSG § 8B2.1.

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USSG Compliance Guidance

Elements of an effective compliance program include:

- Establishing standards and procedures to prevent and detect criminal conduct;
- Ensuring the organization's governing authority exercises reasonable oversight over the compliance program;
- Conducting effective training;
- Monitoring and auditing to detect criminal conduct;
- Periodically evaluating the effectiveness of the organization's compliance program; and
- Implementing a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

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U.S. Attorneys' Manual

- An effective compliance program is a factor that prosecutors are required to consider when determining whether to indict the company, offer a DPA or NPA, or decline to take any enforcement action.
- Principles of Federal Prosecution of Business Organizations:

> "While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formulaic requirements regarding corporate compliance programs."
> - USAM, Title 9, Chapter 9-28.800(B)

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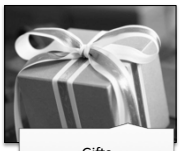
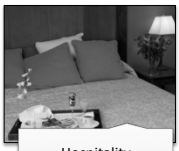
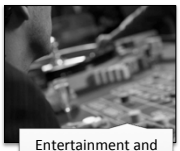
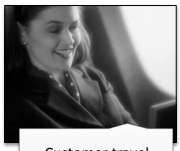
OECD Good Practice Guidance

- Non-binding guidance issued by the OECD in 2010.
- 12 principles, including specifically addressing:

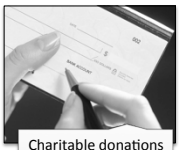

Gifts

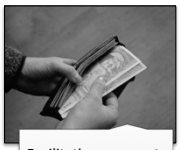

Hospitality

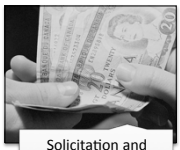

Entertainment and expenses


Customer travel


Political contributions


Charitable donations and sponsorships


Facilitation payments


Solicitation and extortion

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Foreign Corrupt Practices Act

- Creates both civil and criminal liability for individuals and companies and is enforced by the U.S. Department of Justice and the Securities and Exchange Commission
- Two components:

Anti-bribery Provisions: prohibit offering or providing anything of value to a foreign official to obtain or retain business, direct business to any person, or obtain a business advantage

Accounting Provisions: require U.S. public companies to maintain accurate books and records and internal controls sufficient to detect and prevent violations

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Anti-Corruption Enforcement Trends

- Increased investigations, prosecutions and settlements involving U.S. and non-U.S. companies and individuals
  - 2010-2011: 72 enforcement actions against 53 companies & 16 individuals; over $2.2 billion in fines & penalties
- Multi-Jurisdictional Risk (e.g., UK Bribery Act); greater international cooperation between U.S. and non-U.S. regulatory authorities
- Emphasis on prosecuting individuals and industry-wide investigations
- Increased Whistleblower Risk and Need For Speed & Protection of Privilege (Dodd-Frank Act)

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Internal vs. External Compliance Programs

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Internal vs. External Compliance Programs

- Design
- Training
  - Code of Conduct
  - Compliance topics
  - In-person v. online
- Hotline
- Investigations
- Special Resources

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Top 10 Ways to Avoid Pitfalls

1. Enlist your CEO to be the figurehead.
2. Involve middle managers in training programs.
3. Plan periodic campaigns about the program.
4. Establish an Ethics Committee.
5. Create a website.
6. Brand your program.
7. Provide multiple options for asking advice/raising concerns and complaints.
8. Make sure it is credible.
9. Get in front of the Audit Committee.
10. Tell stories.

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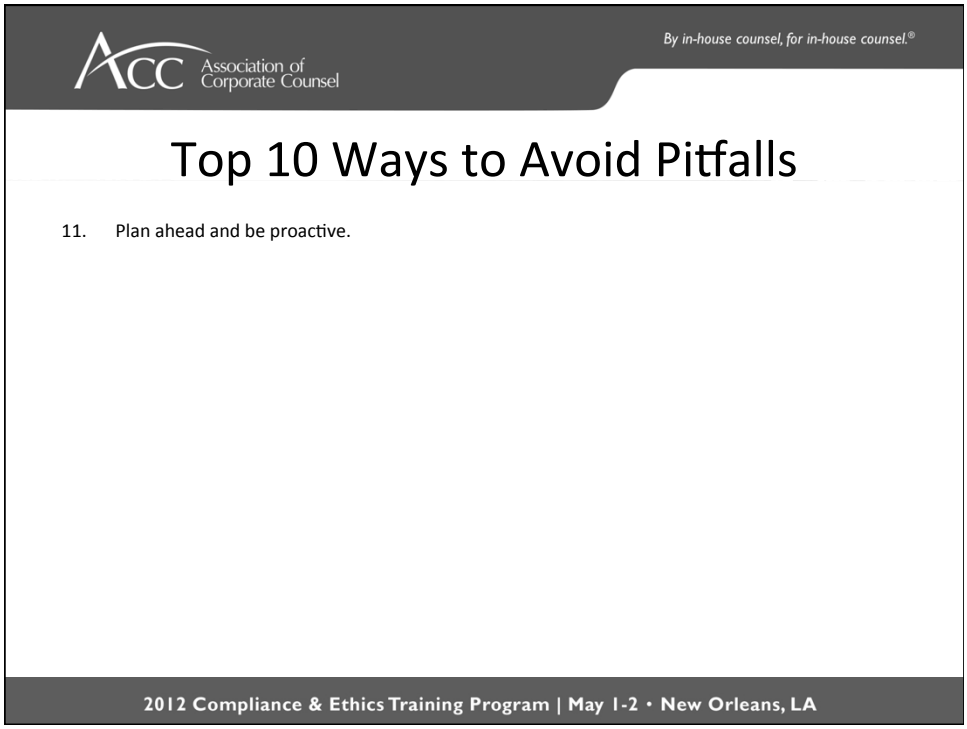

POTENTIAL ANTI-CORRUPTION INCIDENT RESPONSE PREPARATION STEPS

I. Assess Current Risks and Review & Update Written Policies & Procedures

The anti-corruption legal framework and enforcement environment has seen significant changes recently. The implementation of the U.S. Dodd-Frank Act, the U.K. Bribery Act 2010, and other legislation may warrant updates or revisions to current anti-corruption compliance policies. An assessment of the company's current (and expected future) risks and of the anti-corruption legal requirements that apply in each jurisdiction can help the company update its policies and procedures (including training) as needed.

A. Hiring Policies

Many companies have implemented hiring procedures designed to screen for potential anti-corruption red flags. Frequently, these procedures include questionnaires and/or background checks related to an applicant's status as a government official, or as a relative of a government official. These questionnaires and/or background checks also provide documentary support for the company's commitment to compliance should the company ever be subject to an enforcement action.

B. Training Certifications

Though the company's current policies provide for anti-corruption training, the company may consider requiring employees to certify their receipt of the training. Requiring on-line or written certifications of receipt of training (1) can help the company better ensure that relevant employees have received required training, (2) results in an easily testable event for compliance assessments and (3) can provide documentary support for the company's commitment to compliance.

C. Establish Disciplinary Process

The company may consider creating disciplinary guidelines in the event that employee misconduct related to the company's anti-corruption policies is discovered in the future, if such guidelines have not already been established. Though all contingencies can't be planned for, following pre-established disciplinary guidelines can help the company demonstrate that its employee discipline decisions were driven by policy, rather than business preferences.

D. Implement Periodic Risk Assessments

The company may consider establishing periodic risk assessments and monitoring, ideally performed on-site and at the direction of, and with the involvement of, counsel. The frequency and extent of such assessments for each location or operating unit can be varied based on risk factors.

II. Retain Anti-Corruption Counsel & Other Key Advisors in Advance

A. Investigations Counsel

The company may consider selecting anti-corruption investigations counsel in advance of any problem. Doing so enables the company to carefully evaluate various counsel options and negotiate fee terms while the need for anti-corruption counsel is not urgent. By pre-selecting anti-corruption counsel, the company and counsel can better develop a response plan (see below) that addresses key factors such as local counsel coordination, data preservation & collection, local law considerations and notification protocols. By having an on-call anti-corruption investigations counsel, the company would likely be able to more swiftly respond to allegations and incidents with a known team that is already familiar with the company's operations and key personnel.

B. Local Foreign Counsel

As with anti-corruption investigations counsel, the company and investigations counsel may consider pre-selecting local foreign counsel in each of the jurisdictions in which it operates. Selecting foreign counsel early can save the company substantial time during the early days of an investigation, is often necessary anyway to ensure the company's policies, procedures and training are consistent with local law and will often be helpful when other legal needs arise in the foreign jurisdiction. Evaluating counsel in far-flung jurisdictions can be a time-consuming process. It is often better to select local counsel prior to an anti-corruption report or incident, rather than spending crucial time evaluating local counsel options during the key early days of an investigation.

When selecting local foreign counsel, be aware that attorneys in many local offices of international law firms must still retain attorneys from local law firms because of local laws governing the legal profession. As a result, it is often far more cost-efficient and effective for the company or its U.S.-based investigations counsel to identify and retain trusted local foreign counsel directly.

C. Forensic Accounting, Media Relations & Other Key Advisors

When assembling your rapid response team in advance, identify and consider including in your response team other key functions such as a forensic accounting firm, crisis response public relations firm and other key response advisors that may be needed considering the nature of your business.

III. Prepare for Data Preservation & Collection

A. Data Privacy

Many jurisdictions offer employees more robust data privacy protections than the United States, even where employees are using devices and networks owned and controlled by the company. When operating internationally, U.S. companies commonly – and often mistakenly –

assume that the foreign jurisdiction's data privacy laws will mirror the relatively lax protections of the United States.

Insufficient attention to data privacy protections can create major issues in cross-border investigations. For example, in some jurisdictions data preservation orders that would be routine in the U.S. can violate local criminal laws and run afoul of local labor laws. Accordingly, gaining an understanding of local laws regarding data privacy and data collection in advance can help the company more swiftly respond to problems as well as to avoid inadvertently violating such laws during investigations and normal business operations.

B. Data Preservation & Collection Plan

Similarly, the company may consider preparing a data preservation and collection plan for the information technology network of each of its business units. Such a plan would necessarily consider local data privacy and labor law issues relevant to data preservation and collection. Data collection is frequently one of the most time-consuming aspects of a cross-border investigation. Preparing an efficient data collection plan ahead of time can save the company critical time – and a great deal of expense – during a subsequent investigation.

IV. Prepare an Incident Response and Investigation Plan

After the selection of anti-corruption investigations counsel and updating the company's policies and procedures as needed, the company may consider preparing a more detailed incident response and investigation plan. Such a plan often will include procedures for notification to the general counsel, anti-corruption counsel, and the board of directors, as necessary. These procedures likely will vary depending on the nature of the initial report (*i.e.*, internal audit discovery, whistleblower report, or government letter or subpoena). Investigation pre-planning can include data preservation and collection steps, pre-established response teams (including forensic accounting, media relations and other internal and external support service options) and communication protocols that take into account the differences in legal privileges in many jurisdictions.

Tailoring response and investigation procedures ahead of time can help better preserve the company's legal privileges, can help avoid inadvertent violations of local laws and, in general, can help limit the disruptions that frequently ensue after an initial corruption report. Advance planning will help the company and counsel investigate and address corruption-related reports and incidents in a more focused, effective, efficient and timely manner.

Sample

Compliance Program

The goal of the Compliance Program for _____ ("the Company") is to avoid regulatory agency enforcement action, civil penalties or criminal sanctions by implementing a program that trains and emphasizes the professional proficiency of our employees.

Every executive, manager, and employee is responsible and accountable for performing his or her function in compliance with applicable laws and regulations.

The Board of Directors is responsible for:

- Evaluating the risk of noncompliance
- Approving and Supporting the Compliance Program, and
- Overseeing the performance of the program to reduce risk.

Managers and Employees are responsible for:

- Conducting daily business in compliance with the laws and regulations
- Understanding the regulatory requirements of their job description, and
- Identifying issues to remediate weaknesses and prevent violations.

The Compliance Department is responsible for:

- Coordinating audits and examinations in connection with laws and regulations
- Acting in an advisory capacity on company policies, procedures, and laws and regulations,
- Coordinating the monitoring of transactions, and
- Communicating with the Board, Executives, Managers and Employees to ensure awareness, understanding, implementation of and adherence to the Compliance Program.

The following is a general description of the Compliance Program. The Program consists of the following seven components:

(1) Compliance Department;

(2) Compliance Committee;

(3) Compliance Training Program;

(4) Compliance Monitoring Program;

(5) Reporting;

(6) Remediation and

(7) Prevention.

Each component is discussed in detail below:

Sample

Compliance Program

1. Compliance Department

[Compliance Name], [Compliance Title], heads the Compliance Department. It is the duty of the [Compliance Title] to give executive direction to the Compliance Program. He reports directly to the [Supervisor's Title], [Supervisor's Name].

The [Compliance Title] ensures [Trainer's Name], the [Trainer's Title], or her designee, trains company personnel and monitors transactions for compliance with laws and regulations. He also assists management in the development and implementation of forms, manual and system controls, policies, and procedures necessary to ensure compliance with these laws and regulations.

The [Compliance Title] also works closely with [Licensor's Name], [Licensor's Title], to ensure the Company obtains and maintains proper licensing for [Licensed Business Lines].

2. Compliance Committee

The purpose of the Compliance Committee is to offer a forum for the discussion and assignment of current compliance issues, in an effort to resolve or minimize exceptions to policies, procedures, laws, and regulations, as well as to fulfill the Company's responsibility to conduct day-to-day business in compliance with laws and regulations. The [Supervisor's Title] chairs the Committee. The [Compliance Title] acts as Secretary and keeps records and minutes of the meetings.

The Compliance Committee is composed of the following members:

[Supervisor's Name] – [Supervisor's Title] (Chair)

[Name] - Chief Financial Officer

[Name] – Chief Risk Officer

[Licensor's Name] – [Licensor's Name]

[Trainer's Name] - [Trainer's Title]

[Compliance Name] – [Compliance Title] (Secretary)

The Committee meets monthly or more frequently if needed. At the meeting, the [Trainer's Title] reports on the results of recent monitoring, compliance training recently completed, and the training schedule for the next month. Also at that meeting, the [Licensor's Title] reports on the status of pending and renewing licenses, as well as the status of exceptions identified from audits and examinations.

The Committee acts upon recommendations for improvement made by the [Compliance Title] affecting the Compliance function and may delegate responsibility for projects involving remediation or prevention of compliance exceptions. The persons assigned to the project(s) then report on the status or resolution of each issue at subsequent Compliance Committee meetings.

Sample

Compliance Program

A few of the laws and regulations with which the Compliance Committee is concerned are:

A

B

C

D

3. Compliance Training

The Company's training philosophy is founded on the premise that employees will conduct themselves in a correct and professional manner. With this philosophy in mind, it is the Company's responsibility to train employees so that they have a basic knowledge of consumer protection compliance. Due to the technical, complex, and ever-changing nature of these compliance laws and regulations, a comprehensive on-going training program that is varied and convenient and which recognizes proficiency is a necessity. To recognize the different expertise and experience of employees, compliance training has been broken down into two components: (A) Basic Compliance Education for new employees, and (B) Continuing Compliance Education for current employees.

A. Basic Compliance Education

The purpose of the Basic Compliance Program is to make new employees aware that the Company is a part of a regulated industry. The Basic Compliance Program is a portion of the Basic Training required for all new employees, as administered by the Training Department.

B. Continuing Compliance Education

The purpose of Continuing Compliance Education is to reward and recognize employees for achieving and maintaining a professional level of compliance. The goal of the program is for every employee of the Company to achieve compliance certification for his or her job description. Because different jobs have different regulatory requirements and levels of complexity with the laws and regulations, training is tailored to the specific procedures and processes of the job. Each job description includes what is expected to achieve certification. These levels are established and periodically reviewed and updated by the members of the Compliance Committee, who analyze and identify the regulatory requirements for each of the employees.

Under the training program, the [Trainer's Title] tests employees first to determine whether they need additional training on the regulations that apply to their particular job function. If an employee achieves a score of 80% or above, he or she has the necessary experience and knowledge to comply with the laws and regulations, and no further training is necessary. The employee also becomes "compliance certified."

If a score is lower than 80%, an employee may obtain training in several ways. Periodically scheduled seminars or class sessions offered by the Compliance Department and/or Training Department and/or Department Manager are available. Such sessions range in length from a half hour to a half-day to all day, depending on the circumstances and complexity of the regulation, but Trainers will make every effort to minimize the interruption of full staffing for customer service purposes.

In addition, materials are available from the Compliance Department for managers and supervisors to train staff for those who wish to conduct their own compliance training. Employees may then be re-tested to determine whether the additional training was successful. If the employee receives a score of 80% or above, the employee is then "compliance certified."

The [Trainer's Title] administers the testing, training, re-testing, and certification portions of the program. All employees receive a "Certificate of Achievement" for successful completion of the program, "compliance certified" is noted in their personnel files, and certification may be considered by supervisors in their evaluations of performance.

4. Monitoring

The purpose of monitoring is:

- To identify training needs
- To find problems early
- To correct problems promptly, at a minimal cost, and
- To report findings to Executive Management on the effectiveness of the Compliance Program.

The Risk Department conducts monitoring on an annual, quarterly, or monthly basis, as determined jointly with the Compliance Department. This separate Compliance Monitoring Program sets forth the schedule for monitoring, as well as the sampling formula.

The Monitoring Program is distinguished from the Quality Assurance function by the fact that the purpose of Quality Assurance is to perform a daily review of all transactions booked, while the Monitoring Program looks at a statistically valid sample on a much less frequent basis.

Similarly, the Monitoring Program is distinguished from any Internal or External Audit function by the fact that the purpose of auditing is to identify the effectiveness of controls, audits occur much less frequently, and audits normally cover a more limited number of transactions.

5. Reporting

The purpose of reporting is:

- To make executive management aware of compliance performance as it has been identified in monitoring, audits, and examinations

- To recommend an action plan for the remediation and prevention of identified weaknesses through such means as:
    - Additional training
    - The development of preventative tools and measures such as job aids, and
    - The re-assignment of responsibilities, as necessary; and
- To summarize training that has recently been or will soon be conducted.

With assistance from the Compliance Committee, the [Compliance Title] reports on the compliance performance and activities on a regular basis to the Board of Directors and Executive Management.

6. Remediation

When monitoring, audits, or examinations detect prior serious violations of law or regulation, the Company must act in the form of remediation. Remediation is the correction of identified instances where reimbursement or other compensation is due the Company's customer.

In certain "high risk" situations involving a pattern or practice of violations, the regulations, examiners, or Company policy may require retroactive correction in the form of a complete portfolio or file review followed by correction of the identified problems. Examples of such situations include:

- Providing inadequate notices, or none at all
- Not reporting properly
- Exceptions beyond the tolerance level

The person or persons creating the exception, to reinforce their responsibility to conduct transactions in compliance with applicable laws and regulations, ideally perform remediation, with assistance from the Compliance Department and Risk Department as necessary.

7. Prevention

The purpose of prevention is to reduce the risk of exceptions to laws, regulations and procedures. Prevention involves an in-depth risk analysis and/or portfolio review to identify where the Company may need additional controls. The Company works to prevent exceptions through training, the implementation of procedures detailing the employees' duties and responsibilities as it relates to his or her job responsibilities, and through the implementation of adequate manual and system controls.

Compliance Report

To: Executive Management
From:
Cc:
Re: Quarterly Monitoring Report for the period:
Dated:

The following is a summary of the activities of the Compliance Department for the period referenced above.

If you have any questions, please feel free to contact me at Extension XXXX.

I. **Reviews and Approvals:**
The Compliance Department reviewed and approved the following:
A. Scripts
B. Marketing Pieces
1. Direct Mail
2. Periodicals
3. Brochures
4. Posters
C. Forms
D. Training Materials
E. Policies & Procedures
F. Customer Complaint Responses
i. Attorney General
ii. Better Business Bureau
iii. City Attorney

II. **Training:**
The Compliance Department was involved in the following training programs:
A. As Participant:
B. As Leader:

III. **Monitoring:**
This quarter, the Compliance Department verified technical compliance with the following laws and/or regulations and/or processes, with any exceptions as noted:

The following is a summary of our documented self-monitoring metrics:

The Compliance Department also randomly monitored "judgmentally-selected" live calls this quarter, with no identified exceptions. Next quarter we plan to move toward using statistical sampling techniques, to more accurately identify the universe, and allows us to project frequency and predictability of exceptions.

As [Title], I personally supervised all compliance activities noted. I hereby certify that the above Compliance Report is true and accurate to the best of my belief and knowledge.

/s/ [Signature]

Ethics, Conduct, and Values

Working in the public interest requires MITRE to render impartial services that are free of conflict of interest. In performing our work, we at MITRE must adhere to the highest standards of ethical conduct and business practice. MITRE's Ethical Values and Code of Ethics and Conduct guide employees in the recognition and resolution of ethical dilemmas.

Ethical Values

Service in the Public Interest	Honesty	Professional Integrity
Respect for the Individual	Fairness	Independence
Promise Keeping	Impartiality	Collaboration

Code of Ethics and Conduct

We at MITRE:

- Conduct ourselves professionally at all times;
- Perform to the best of our abilities in an honest, cooperative, and fair manner;
- Respect the rights of all individuals to fair treatment and equal opportunity in an environment free of discrimination and harassment;
- Protect MITRE's information and materials and those of sponsors and contractors;
- Avoid any actual or perceived conflict of interest in personal and business relationships;
- Refrain from misuse of our professional positions for personal gain;
- Respect the ethical constraints our clients place on the activities of their employees;
- Adhere to our government sponsors' rules concerning source selection, procurement integrity, and avoidance of organizational conflict of interest;
- Protect MITRE and government resources from theft, damage or misuse;
- Accurately and conscientiously record all time charges, costs, and other business records;
- Comply with laws and regulations that affect our work.

All MITRE employees, consultants, and contractors are obligated to comply with this Code. Your management, Human Resources, and the Office of Ethics and Compliance encourage you to discuss with them the obligations and ethical dilemmas you may face. You may also direct questions or concerns in confidence to MITRE's Employee Hotline, which is answered around the clock.

1-800-MITRE-4-U
(1-800-648-7348)

E&C Ethics and Compliance

CUSTOMER SERVICE DEPARTMENT
Pre-Monitoring Management Questionnaire

1. Please provide an organizational chart for the department. Include a description of the duties (or areas of responsibility) for each of the individuals listed on the chart. Also provide details on how long they have been responsible for each of the areas listed. Detail each manager's relevant experience.

2. Please provide a copy of the latest version of all policies and procedures that are used to guide the activities of the department. Please advise who wrote these policies and procedures and the date they were written or last revised. Also please advise who approved these policies and procedures (e.g. Department Manager, Compliance, Legal, etc.).

3. Please list all software applications used by the customer service department. Has the accuracy of the software ever been tested? If yes, when was it last tested and by whom? If the response is in the affirmative, please also advise whether any report was prepared detailing the tests performed and who was given a copy of that report. Please provide information as to how often system support is needed for each of the applications and whether those activities are logged. Also please provide information relative to where the system support is obtained (either inside the company or from an outside vendor). If the software support is obtained from an outside vendor, please provide a copy of that vendor agreement.

4. Please provide a flow chart that details the work processed in the department.

5. How many and what types of matters are normally routed through the customer service department each month (eg. complaints, information requests, etc.)? Do the representatives have any type of script that they follow at the inception of the call? If they do follow a written script, please provide a copy of same.

6. Please advise how long it normally takes to handle each type of matter detailed in item# 10

7. Are any tracking mechanisms in place that automatically monitor the number of matters handled by the department? Is there any type of monitoring of the success rate as defined by what percentage of callers are satisfied at the conclusion of the call versus the percentage that either hang up before we answer or are otherwise so dissatisfied with the result that they direct their matter elsewhere? If no, are any types of tracking mechanisms that will achieve these objectives currently under consideration?

8. Are there any types of customer matters that are automatically routed to other departments within the organization? If yes, please advise what types of matters fit into this category and where, within the company, these matters are directed.

9. If the answer to the first part of item# 13 is yes, please advise if any tracking mechanism is in place to follow up on items transferred out of the department.

CUSTOMER SERVICE DEPARTMENT
Pre-Monitoring Management Questionnaire

The purpose of a tracking mechanism, such as a log in this instance, would be to ensure that some follow up is actually done by another area within the company. If such a tracking mechanism is in place, please provide details of how that tracking mechanism functions.

10. Is any tracking mechanism in place that monitors repeat complaints? This would include either the same customer complaining about the same issue more than once or different customers complaining about the same issue?

11. Are the customer service representatives authorized to provide a caller with any type of benefit as a result of a complaint. If so, please list the benefits each customer service representative is authorized to provide to a customer. Items that fall within this category include a payment deferral, the waiving of a late fee or the waiving of some other type of fee, the changing of a delinquency history in our system, or any other type of benefit that might affect a customer's amount due, payment due date, or any other aspect of the account relationship.

12. Are written instructions provided to the customer representatives that detail what they are supposed to do with a caller that is irate or is otherwise uncontrollable? If yes, are these instructions in writing? If yes, are they part of the policies and procedures requested above? If not, please provide a copy of same.

13. Is there any type of queuing system in place that monitors how long a customer waits before a customer service representative takes their call? Do we do any type of trend analysis on this data or any other type of data that tracks service standard levels? If yes, is the actual performance measured against predefined goals that outline management's service standard expectations of the department?

14. What regulatory training has each of the personnel in your department had that relates to their current duties?

15. Do you feel that their current awareness of the regulations that affect their area of responsibility is adequate?

16. Does the department maintain any type of regulatory material in the form of reference sheets, copies of regulations, materials provided at training sessions, etc. that are used to assist department personnel in the performing of their duties (apart from the policies and procedures discussed in item# 4 above)?

17. Are there any periodic reports that detail the level and type of activity in your department that have not been previously addressed in this questionnaire? If yes, please advise how these reports are prepared and where the information is obtained that is used to prepare these reports.

18. Please provide the most recent version of all reports used to monitor the activities

in your department that have not been previously addressed elsewhere in this questionnaire. This includes reports created by your personnel as well as reports created in other areas of the company, such as IT. If voluminous please provide the title of the report, how frequently it is created, what information it contains and the number of pages in the report. Please advise which of these reports you use, and which ones are used by others outside your department. If used by others state who uses them and for what purpose. Also state which reports, to the best of your knowledge, are used by no one.

19. Please provide a copy of any preprinted forms used by your department. Also please advise if anyone approved these forms (e.g. Department Manager, Compliance, Legal, etc.).

20. Please provide a copy of any preprinted letters used by your department. Also please advise if anyone approved these letters (e.g. Department Manager, Compliance, Legal, etc.).

21. Does your department do any type of self-monitoring not previously discussed above? If so, who does it, how often is it done, how is it documented, and what is done when errors or other problems are found? If a specific sample size is selected, what is the size and how is that size determined? If some type of report is prepared to document the self-monitoring, to whom are these self monitoring reports distributed?

22. Please provide a copy of any vendor agreement(s) we have with any third party service providers that deal primarily with your department.

23. Please provide copies of any reference materials provided by any third party vendor(s) that deal primarily with your department.

Association of Corporate Counsel

InfoPAK℠

Managing Foreign Subsidiaries

Sponsored by:

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THE WORLD'S LEADING ASSOCIATION OF INDEPENDENT LAW FIRMS

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Managing Foreign Subsidiaries

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Provided by the Association of Corporate Counsel
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This InfoPAK℠ examines the common issues that United States companies face when beginning operations abroad or considering establishing foreign subsidiaries. The InfoPAK begins with a discussion of whether to establish a foreign subsidiary and then discusses the various considerations surrounding how to do so, including staffing issues and the use of local third party experts. Finally, the InfoPAK details a variety of compliance concerns associated with foreign subsidiaries, including how to establish a meaningful compliance program, what areas of compliance to focus on, and how to conduct cross-border internal investigations.

The information in this InfoPAK should not be construed as legal advice or a legal opinion on specific facts and should not be considered representative of the views of Lex Mundi, Bass Berry & Sims, PLC, Brett Coffee or of the ACC or any of its lawyers, unless so stated. This InfoPAK is not intended as a comprehensive or definitive statement on the subject, but rather serves as a resource identifying areas that require evaluation and providing practical information for the reader.

The information contained in this InfoPAK was developed by **Lex Mundi**, the 2011 Sponsor of the ACC International Legal Affairs Committee, and Lex Mundi's member firm for Tennessee, **Bass Berry & Sims, PLC**, and **Brett Coffee**, General Counsel, Computer Systems Center Incorporated. For more information on the authors, please see the "About the Authors" section of this InfoPAK.

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Contents

I. Introduction to Foreign Subsidiaries

As the world grows ever smaller, it seems that business is rapidly becoming ever more international. Companies that were local operations just a few years ago, now have the reach and opportunity to grow sales into foreign markets thanks to technological and regulatory changes. And with the global economic downturn, companies are looking to foreign markets as an area of untapped potential for increasing sales and growth.

With one or two sales abroad, the risks for a particular company may be very small in terms of what operations need to be established. However, once a company decides to go after one or more foreign markets, a dizzying array of legal and compliance issues arise. Also, while it seems that the barriers to foreign travel and communication have diminished, companies who don't do their homework are often astonished to discover the actual requirements for international business or business in a foreign locale.

Forming and working with a company's foreign subsidiary is definitely different than working with domestic entities. But as with foreign travel, it can be immensely rewarding (professionally as well as financially) if you have the right attitude, prepare your company well for its work overseas, and manage the compliance matters that arise when you cross borders.

II. Establishing a Foreign Subsidiary

A. Whether to Establish a Foreign Subsidiary

When you decide to branch out into international operations, the first question you should ask is whether the business model is appropriately developed for the new adventure. A lot of your preliminary questions will not be driven by legal considerations, but rather by your business model. The business approach in the foreign country will—and should—drive many of the answers to early decisions. For instance, will you be manufacturing in the foreign country or importing products? Does your business model rely more on intellectual property protection than on creating a tangible product? As a general rule, the more your company requires a physical presence in the foreign jurisdiction, the more formal your entity choice must be.

The connection between physical presence and increased formality makes logical sense when you think about it. Just like in your home country, there is more legal analysis necessary if you are dealing with a unionized workforce than a professional workforce, owning factories rather than renting storefronts or dealing with a highly regulated industry rather than sales relationships. But companies face a unique makeup of hurdles that they must consider, and so the choice of entity really needs to be directly related to the type of structure you create in the foreign jurisdiction. Typically, the more formal the relationship required, the more commitment and investment your company's structure will need to be able to handle.

Although this InfoPAK is focused on foreign subsidiary relationships, let's very briefly take a look at what entity choices are available and what the predominant factors are in choosing one type of entity over another.

1. Getting Your Foot In the Door

Regardless of the economic climate, many companies are daunted by the costs of having a foreign presence. Managing risk might be your biggest concern, but managing costs will constantly be a top priority of the business.

One of the first issues you might confront is whether you need a formal presence at all in the foreign jurisdiction. Many companies want to "dip a toe" into the foreign market before (and sometimes instead of) establishing a formal company with all of the attendant costs, risks, and compliance requirements. This hesitance is understandable since no company likes to overcommit to a strategy before it knows whether it will be successful. Further, most companies want to have some firsthand experience dealing with local conditions, as this will often affect how they structure their legal, financial, and business operations. Consequently, some experience at the outset can go a long way towards establishing the right structure for your company.

The easiest way to get involved in a foreign jurisdiction is to have your domestically-based sales team focus on the foreign market without having them based in-country. Companies often start by asking their sales personnel to start making sales inroads abroad while remaining physically in their home country. Generally, sales professionals can make inroads through short trips to the foreign jurisdiction, and there is less up-front investment to this approach (at least while starting out).

When following this approach, there are a few important legal implications you will need to manage. The immigration laws of that particular country will be the first hurdle, and the sales team will need to have a basic understanding of the business visa rules for that jurisdiction.[1] As an unlicensed business to the foreign country, you may face less favorable tax liability for doing business in this way. Thus, a strong understanding of your tax situation is highly recommended and may require consultation with local experts (such considerations are discussed in more detail in Section II(C), below). In addition, you may find it difficult to navigate rules on import/export licenses, product licenses, and ensuring your sales people are operating effectively within the immigration restrictions. But generally speaking, starting by having your domestically-based sales team begin opening up the foreign market is an accepted way of operating, and may work well for many businesses. Of course, any domestically-based sales team must be well–versed in all compliance matters, especially the U.S. Foreign Corrupt Practices Act (FCPA) and any foreign country anti-corruption laws.[2]

Also, when operating in this way, you will naturally want strong local partners to guide you. But you may not know *who* those partners are yet, since the whole point of this strategy is to get your feet wet. In this case, the in-house counsel can play an important role in pulling together both legal and non-legal information that can affect a company's success in-country (see Section II(C), below, for a detailed discussion on working with third parties). The foreign jurisdiction's embassy can be an important (and often overlooked) source of information on how your business people can appropriately do business there. The U.S. State Department and the local U.S. embassy may also have important information on the country, culture, and business environment.

2. Formalizing the Relationship

As sales increase and your relationships grow stronger in the foreign jurisdiction, at some point (and possibly several points along the way) you will want to consider establishing a more formal

legal structure for your foreign operations. Indeed, in many cases you will have to establish a more formal presence for legal, regulatory, tax, or employment reasons. When you decide to take this step, you will have a number of choices for how your business should best proceed.

a. Agent/Distributor Relationship

Many companies prefer to work through an agent or distributor who would resell your product in the foreign jurisdiction. While this approach limits your need to address many legal and business issues, your product is in the hands of a foreign company (merchant or reseller) that has wide latitude practically, and possibly legally, too, on how your product is treated in the foreign jurisdiction. Many small companies use the agent/distributor relationship as a good first step to increasing foreign sales, and some companies find the right relationships and use this method happily. But for others, it does not provide adequate control over their product or business relationships.[3] In any event, it is important to conduct due diligence on any agent or distributor, including thorough background checks.

b. Licensing/Franchising Relationship

Depending on the type of product you are selling, it may make more sense to establish a licensing or franchising relationship with one or more local partners. This approach works well for companies that are used to ceding control to local partners anyway or must have local involvement for legal requirements; however, counsel should be aware that there are numerous legal hurdles to successfully implementing international licensing or franchise operations. Perhaps the biggest impediment for companies investigating their licensing/franchising options is ensuring quality control in the foreign market as this will be under the control of the foreign partner. Grey market goods (legally licensed products that are reimported into the home market) are also becoming an increasing problem.

c. Joint Ventures/Strategic Alliances/Etc.

Your business may have relationships with companies already established in the foreign jurisdiction or may have complimentary interests with an established company. If so, forming a joint venture, strategic alliance, or other formal relationship may address some of the shortcomings found in the other choices. Of course, in addition to resolving potential anti-corruption, antitrust or competition concerns, you must ensure that your business interests are sufficiently aligned so that there is a strong working relationship while ensuring that the foreign party is not simply motivated by learning your business sufficiently to later cut you out of the business. This can be a fine line to draw in the business world.

d. Foreign Subsidiaries

Finally, you can set up your own subsidiary or affiliated entity (in many cases, full legal control over the entity will not be possible). The benefits to establishing an entity yourself include:

- Control over operations and product quality;
- Direct relationships with suppliers, partners, and customers;
- A direct pipeline for market intelligence; and
- No middleman with whom to share the profits.

But there are legal hurdles and choices to consider, as well as business, regulatory, and tax issues that you will have to address before determining the entity form that is right for your business.

3. Benefits and Challenges Associated with Foreign Subsidiaries

Establishing a foreign subsidiary is very much akin to establishing an entirely different company. You will have a degree of control no matter what entity you choose. But while that control is greater in a foreign subsidiary setting, so is the level of commitment. For that reason, many companies do not take this step right away, preferring something less formal initially.

Nevertheless, setting up a formal subsidiary in the foreign country has important advantages. One of the most important benefits is that you are signaling strength to the target market. Taking the time to set up a local company, establish local relationships with experts and service providers, and investing the time and money intelligently will signal success and permanency to customers, competitors, and regulators in the foreign market. These benefits may save you the headache of dealing with much of the initial doubt and skepticism a new company will face, which alone may be worth the upfront cost. Creating a subsidiary may be required for legal reasons (e.g., in order meet industry regulations or to hold title to real property) and may not be required, but as a practical matter you may find it necessary to establish an entity for tax structuring purposes. In fact, the primary driver for you to set up a foreign operation may be the very benefits attendant to a particular form of entity, combined with local laws. Generally, doing business internationally places an even greater emphasis on signaling and reputation. So if your reputation matters, it is best to treat it well.

Naturally, there are downsides to establishing a formal entity as well. The upfront costs can be significant. A new company must usually establish relationships with professionals, customers, employees, and others. Compliance and management will become more complicated, not merely in the foreign jurisdiction, but potentially in the home jurisdiction as there may be conflicting rules on things like disclosures or required actions. The downsides generally can be solved with time, money, and patience, and this InfoPAK is designed to help you understand how to minimize the first two and preserve the third.

4. Local Staffing or Expatriate

Another issue you will soon run into is staffing the new entity. You will need to ask whether you should hire locals, who may have far superior knowledge of business customs, contacts, and local practice on how to get business done according to local custom (but without, of course, violating the FCPA or similar regulatory schemes).[4] Or should you send trusted, home–office employees to staff and run your company in the foreign locale, confident that they will infuse the local company with the home office's corporate culture (as much as possible) and have a sensitivity for the hot-button issues that the home office is most concerned about? If only the matter was that easy!

In reality, when it comes to staffing a foreign office, virtually every choice has a potential downside. One possible downside of utilizing home employees is that they can 'go native' in where their loyalties lie, and can forget about the real-world home–office concerns that no one in the 'field' thinks is that important. In part, this reflects simple human nature. But cultural, linguistic, and job qualification problems can all hinder employees transferred to local offices. Moreover, the transferred employees' pay packages (which often also include moving,

immigration, and language training expenses)—while certainly justifiable and often necessary—can often exceed the costs you will incur by hiring locally.

On the other hand, one benefit to sending a home office employee to a different country is that you can recall them back to the home office and deal with any disciplinary or termination issues under your home jurisdiction laws, rather than under the potentially stronger or more unknown laws in the foreign jurisdiction. Moreover, local employees often have two advantages that can make staffing and management a real headache for the company: the law and their local knowledge. There are enough stories about the legal roadblocks companies face in dealing with their employees in foreign jurisdictions—and often, this applies equally to domestic firms in the local jurisdiction.[5] There are times when you just can't get around this and you will need to staff locally (e.g., staffing a manufacturing plant). The critical thing to note is that in many jurisdictions, a company cannot contractually change the employment terms that a foreign jurisdiction establishes, and even if you can as a matter of law, you cannot do so preemptively. Consequently, whenever you want to fire employees, shut down a plant or operations in a country, or change work rules, you may need the approval of a union or workforce board. This means that any of these changes will cost your company, and it won't be cheap.

Your professional workforce may also be well–protected by a combination of governing laws, contracts, and simple inertia. One of the authors worked with a company where the local managing director of a subsidiary insisted that every executive at her level in that country was provided a car for business and personal use, and it had to be of a certain (very expensive) make of automobile or she would lose face. Then, when the subsidiary was shut down, the corporate office discovered that: 1) her assertions were not true; and 2) that terminating the lease was nearly as expensive as continuing it, so it became a part of the severance package…at a great benefit to the executive!

If your foreign office will be large enough, staffing it with both local and home office employees can offer many advantages. It can be particularly helpful to have home office veterans in (or with clear visibility of) the finance, compliance, and quality control functions. In jurisdictions where the business practices, cultural norms, corruption risks, and legal systems are very different from the home office, having one or more home office veterans at the foreign office can be especially important.

In a situation where you will naturally have less control over your foreign subsidiary employees than you would over home office employees, it is critical to establish means of knowing what is happening in your foreign operations. There are three components to a successful strategy in this area.

1. ***Personal Contact*:** One of the most effective approaches is simply to make those human connections felt when dealing with employees who are a long way from headquarters, and who may not be getting the care and attention they should. It's especially tempting to be budget-conscious and minimize trips overseas, but distant employees will lose touch with the business and the legal schemes under which both the subsidiary and the parent have to work. Especially when dealing with compliance and training issues, the tone can be delivered in a much more productive manner when you are all in the local environment.

2. ***Checks and Balances*:** It is critical to have second and even third opinions on matters, both mundane and important, especially until your local team is well integrated into your corporate operations. Your first line of defense in this area should be local counsel. They will help you understand not only the law, but also the context of business rules in their country. But networking to gain a broader understanding of the business environment on the ground will also act as a check, as will moving deliberately into a few targeted markets rather than many all at once.

3. ***Plan in Advance*:** While you may be used to a certain timeframe in your home country, things always take longer in a foreign jurisdiction. Translation, distance, time zones, varying business and legal approaches, and timing requirements all conspire to make transactional business decisions much different than you may be used to. Time will not heal all problems, but it is usually a prerequisite *for both effective and ineffective solutions*. For example, if a domestic reduction-in-force will take two weeks to plan and fully implement, it can take many times that simply to provide the minimum legally required notifications to employees in foreign countries. Plan ahead, or better yet assume that the process will simply take longer in a foreign jurisdiction. If nothing else, you will be better prepared to deal with the delays if you have built them into your plan from the start.

These three approaches won't prevent all problems, but having them in place will allow you to see more of what is happening and deal with potential problems at a manageable stage.

B. Holding Companies

Holding companies have a limited usefulness in international operations, but can provide some important tools in certain situations. Like many domestic–entity decisions, form is somewhat dictated by function here.

Many companies use holding companies to simplify their operational structures. In Europe, for example, companies may wish to have local subsidiaries in each of the countries in which they are selling for legal, tax, or related reasons. Each subsidiary, however, may only have a relatively small number of employees, and it may be useful to have each subsidiary qualify as smaller businesses locally to minimize certain regulatory burdens. Replicate this structure over many countries, however, and you will need a relatively robust corporate office function to support the totality of those operations. That may be best dealt with at the holding company level, with costs shared among the local subsidiaries.

Other companies may find a holding company helpful for tax or regulatory structures. For instance, it may be beneficial to structure your affairs so that the profits flow more to a relatively low-tax jurisdiction, such as Ireland or the Netherlands.[6] Certain companies may also find that it is useful to have a company in one jurisdiction handle all the imports for a region because of favorable import rules, tax structures, or business environments, and then move products to local jurisdictions. Interplay between local rules, especially in the post-Schengen environment in Europe,[7] may provide strategies for more efficient movement of products to the target markets.

Finally, companies may be faced with a situation where a holding company is a useful fiction when addressing tensions within a certain structure. Imagine you have sales teams in Brazil, Mexico, and Argentina, but not the other Latin American countries. Clients in those countries can

be served by the sales team you have, but there may be different commission structures or disagreements between joint sales efforts in a target country. A holding company can provide a useful structure for dealing with those potential conflicts in a more neutral manner. For instance, objections about cost or sales incentive differences can be dealt with through separate processes without upsetting the local sales operations that have local presences.

C. Third Parties to Rely On

In Section II(A)(4) above, we briefly discussed the importance of local counsel and third party contacts to act as a check and balance to the information you receive from your in-country team. While it is important to get multiple views on the most effective business customs and approaches, it is also extremely important to skillfully partner with these experts, as discussed in detail below.

1. Local Counsel

For in-house counsel, the most critical relationship in–country is with a local lawyer who is highly knowledgeable of local laws, regulations, taxes, and customs. Not only is a local lawyer critical for establishing your entity in accordance with local law and advising you on the regulatory landscape you need to navigate; it is also usually a great source for finding the right expert in a host of other fields.

Like in the U.S., law firm lawyers (and many professionals) are often experts in issues relating to specific types of law as well as different industries. So, a technology start-up company will often find that the best professional for them is different than the best for a manufacturing company. While establishing a foreign subsidiary is generally fairly easy for many foreign lawyers to handle, the attendant legal, tax, compliance and financial implications that an experienced lawyer can identify is where their real value lies. If the objective is to be as cost-effective as possible, the best option is generally to have one lawyer in the foreign jurisdiction who can handle all of your basic needs, such as entity formation, initial government filings, and explanations of basic regulatory frameworks.

Moreover, know whether your local lawyer or local law firm is licensed to practice law in the local jurisdiction. In some foreign jurisdictions, such as China, attorneys employed by foreign law firms are not authorized to practice law and may provide only business advisory services.[8] Where a foreign office of a U.S.-based international firm might itself have to retain locally licensed counsel, it can be more cost-effective for you to retain local counsel directly or through your U.S.-based primary counsel.

The foregoing presupposes that you can find a lawyer in the foreign jurisdiction where you often, by definition, have little experience. One of the best methods for finding a lawyer in another country is to ask your domestic lawyer for a recommendation. Law firms that deal in specific legal areas often know their counterparts in other jurisdictions and are in the position to make recommendations. So are those in-house lawyers who have experience setting up foreign subsidiaries and operations. While your Belfast solicitor may not know any lawyers practicing mining law in the U.S., your London solicitor very well may. The other nice benefit of having your home country law firm recommend someone is that everyone's reputation is tied into fair dealing. Think of it as your initial screening process when you don't know where to begin.

Similarly, ACC has two resources that are invaluable in choosing and vetting foreign counsel. One is the ACC Value Index, which is an online searchable database of in-house counsel's rankings and evaluations of law firms, many of whom are in foreign jurisdictions and can be searched by jurisdiction or by matter type (www.acc.com/valueindex). The second resource is the ACC online platform called Member–to–Member (www.acc.com/m2m), which includes practice-based eGroups, through which members can ask fellow in-house practitioners for recommendations (*see* www.acc.com/egroups).

Alternatively, accounting firms are also excellent resources and typically know many local attorneys or experts if they have international reach or connections. Other options for identifying local counsel include international legal networks, such as Lex Mundi (http://www.lexmundi.com), whom you can contact directly for recommendations or receive lists of participating firms with a variety of expertise.[9] These approaches can be used together to supplement what you find from your personal connections.

2. Financial Consultants and Others

Likewise, how do you find the other experts you will need in the foreign jurisdiction? Once you find local counsel or accountants, your best option is often to ask them for their recommendations. They will often be able to steer you toward the most relevant expert and have experience dealing with each other. That often saves both time and money.

But keep in mind, if you rely on the reputation of your domestic lawyer's contact, without an established relationship there is always the possibility that your newfound contact may in turn be less careful in recommending exactly the right expert and may instead connect you with someone who might be related or connected to your original contact behind the scenes. Many experts won't steer you wrong, but you need to pay attention. The first thing you need to do is a cost-benefit of the recommendation. After all, if you are paying €500 for a single transaction, it may not be worth it to spend two hours of follow-up to find out that you could have spent €450. At the same time, you should probably spend more than two hours checking the reputation of your overseas accountant unless it is the foreign branch of your local accountant.

Often, it is worth having someone in your company who has experience working with foreign companies, subsidiaries, and foreign nationals. In working overseas, sometimes the biggest pitfalls are the assumptions locals make about the knowledge of foreign, sophisticated companies. ("Of course you need residency permission from the local police—why wouldn't you?!?") If you're not comfortable with your recommendations, or can't find any recommended attorneys, international chambers of commerce in the local area are often a good place to start.

D. Other Considerations

1. Intra-Company Transfers

You could write entire books on the subject of staffing foreign subsidiaries with employees from another part of the corporate family, commonly referred to as "intra-company transfers," but the sheer variety of issues would boggle the mind. Any time you have people from one culture going to live in another, there are going to be some interesting issues to work through. And those issues

change all the time. Being an expatriate for an international company has often been a very lucrative (if disruptive) choice for employees, but many companies have been pulling back lately. The costs of sending employees abroad can be very high, and companies lately have been looking to trim the costs of semi-permanent relocation overseas.[10] However, companies who decide not to invest in a very high-quality executive team overseas (be that from the home jurisdiction or locally hired) may sooner or later face even higher costs in terms of reputational damage, compliance problems and lower quality business results.

There are some things you should consider with intra-company transfers. First, you should be aware that sending a home office employee might not save you from local hiring laws and practices. But those employees may also retain the protections from their home jurisdiction. As a practical matter, most issues get resolved with common sense. Because you are investing a substantial sum in sending these employees overseas, you tend to send employees who have a certain level of maturity and savvy, and many issues that arise get resolved through discussion and shared standards rather than conflict. But you should still be on your guard for additional—or even conflicting—employment law protections, as these situations often grow complicated very quickly when true disputes do arise. For instance, you may be able to rely on home jurisdiction employment rules in terminating an employee; but you may need to first return the employee home to do so, and when companies are facing difficult economic situations, the financial outlay to address a dispute may not be the easiest course for a company.

And those laws can be challenging for any counsel. It's not uncommon for unions to approve changes to laws or standards or for companies to be held liable for failing to get those approvals. In many cases, what would seem like a positive benefit (e.g., flex-time, non-standard work week) still needs to be approved by a union committee. Even shutting down a company or terminating employees when the company is hemorrhaging money needs to be approved by a worker's council in some countries. Thus, always do your homework on local laws and requirements.

Finally, it always seems like a no-brainer in retrospect, but negotiate the expatriate package and especially the repatriation policy up–front. There can be a lot of emotions when things start going badly, and the last thing your employee should be worried about is getting their family home. It can turn a disappointed employee into a cornered one when you least want it.

2. Growth Considerations

Growth is almost always considered a good thing. But for an overseas subsidiary, growth can also turn into a series of challenges. Managing growth should really be a business issue, but it is one that will touch on a number of legal issues. Planning for rapid growth is always a priority, and we would never suggest that you aim for anything less. However, each of the authors has watched foreign subsidiaries get overstaffed and be rolled–out too aggressively to sustain the foreign business. While there are many examples of foreign operations growing substantially within a short period of time, it is more likely that an abundance of patience and flexibility will be prerequisites for success. As the lawyer, you need to be able to provide an appropriate level of structure and support to the company's overseas operations while managing the risks.

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where the company pushes forward aggressively, leading to increased risk, putting pressure to succeed (necessitating pushing forward even more aggressively). Unfortunately, it usually falls to the lawyer to explain the risks and the need for a long-term view. Even though this risk management role can be perceived as "getting in the way of the businesspeople" or "not being a team player," it is necessary to protect the company.

The second consideration in dealing with growth issues is on the compliance side. As will be discussed below in Section III of this InfoPAK, compliance across borders can make life very interesting. Where it begins to break down is when you don't have a hands-on, comprehensive program, and where growth outstrips the ability of the compliance program to keep pace. Much of the compliance work involves handling cultural nuance. Many foreign employees simply will not engage when the message is compliance with the headquarters' country law, or is seen as a form of cultural imperialism through application of foreign norms. This is exacerbated when growth is high-paced, the message is focused on taking advantage of the business opportunities above all else, and the lawyer is spending his/her time focused on new contracts instead of making sure the reporting system is doing what it's designed to do. Section III, below, discusses some strategies that in-house counsel can use to address some of these issues.

The third area where growth can become a problem is closely related to the first two. Generally, when growth happens, it can quickly overwhelm counsel's ability to respond to a variety of demands from the business. This corporate hyperactivity can devastate the processes that have been set up to ensure that the company is in compliance with laws, and also prevent employees from taking appropriate steps on the business and even humanistic sides of the coin. Something as simple as human respect can make an organization succeed, but an organization that lacks that touch can quickly spin apart. Even where this is not the lawyer's responsibility, taking the time to sit down and understand your coworkers or counterparts can make the difference between success and failure in negotiations, prevent mass defection of employees who never see the human side of a far away organization, and remind you that you're talking about people's families as well as compliance. Where the lawyer remembers to take the time to gain a perspective on the motivations behind the activity, counsel should keep in mind that they still might have to deal with the results of someone else's actions and manage the risk scenarios appropriately.

3. Intellectual Property

All too often, companies' protection of their intellectual property is an afterthought. To avoid potential problems, there are a few considerations you should keep in mind if any of your intellectual property assets will be a significant part of the business conducted by your foreign subsidiary. The good news is that many intellectual property protections are largely standardized, given that several foreign countries are signatories to important intellectual property treaties, to which the U.S. also is a signatory. The potential pitfalls arise, as they often do, from minor, but important differences.

The Berne Convention for the Protection of Literary and Artistic Works[11] is an international copyright agreement to which the U.S. and many foreign countries are signatories. The Berne Convention sets minimum copyright protections to which all signatory countries must adhere, such as a minimum duration of copyright protection of 50 years beyond the author's death for most types of works, as well as minimum remedies that must be available to curb infringement. However, it is worth noting that U.S. copyright law, thanks to forceful lobbying efforts, is robust compared with similar laws in other countries. For instance, unlike most other Berne signatories,

the U.S. severely limits so-called "moral rights," by which a copyright owner can further restrict certain uses of his/her works. Moreover, in the U.S., there are provisions that govern ownership of copyrightable material that is created in the context of employment, such as the concept of "works for hire," which determines the owner of a copyright if the work is created in the scope of employment. However, in many countries, ownership of copyrights—and IP rights in general—can be much more ambiguous, so if you have significant copyright assets, it is advisable that you research the laws applicable to copyright (also called "neighboring rights" in several countries) in the jurisdiction of your foreign subsidiary to determine the available level of protection.

Likewise, most countries around the world, including the U.S., are signatories to the Agreement on Trade-Related Aspects of Intellectual Property Rights (or "TRIPS"),[12] which provides minimum standards in several intellectual property fields, such as copyright, patents, and trade secrets. In the U.S., there is no standardized definition of a trade secret because it is determined on a state-by-state basis. But generally, a trade secret is information that is secret, is commercially valuable because of its secrecy, and is subject to reasonable efforts to preserve that secrecy. The TRIPS protection parallels this definition, but because every country defines and enforces trade secrets differently, you should familiarize yourself with the trade secret laws in the country where your subsidiary will operate.

Ultimately, it is vital that you investigate the applicable laws regarding *all* types of IP assets that you will use in connection with your foreign subsidiary. In some countries, the timeline and process for registration of trademarks and patents differ considerably from U.S. practices (note that there are also treaties and protocols for trademark protection, such as The Paris Convention for the Protection of Industrial Property[13] and The Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks[14]). Many companies are surprised to learn that U.S. registration of these and other IP assets does not protect them when used abroad. Although it is possible in some countries to develop common law rights in trademarks simply by using them, registration is always advisable, both in the U.S. and abroad. Furthermore, with respect to competing IP registrations, some countries afford priority to the first person or entity to *file* for registration, regardless of whether that person or entity was the creator or the first to *use* the IP. Therefore, you must ensure that you are familiar with the registration process for all types of IP in any country in which you will be operating a foreign subsidiary.

Finally, a quick word on technology contracts, especially those pertaining to software and web hosting. Most companies rely heavily on such contracts for their various systems and essential software. Such software and technology can be subject to export restrictions, and many agreements specifically proscribe international use of the subject products and services. Thus, it is vital that you review any applicable agreements concerning software, technology, and/or web hosting services that you plan to incorporate in your foreign subsidiary in order to avoid running afoul of the agreements—or worse, U.S. and international laws.

III. Maintaining Compliance for the Foreign Subsidiary

The establishment of a foreign subsidiary leads to new challenges for the legal team. As with any subsidiary, foreign or domestic, the new entity will have compliance obligations. Moreover, in most cases, the foreign subsidiary will need to ensure compliance with both local law and certain U.S. laws. Though any compliance program will need periodic review, thinking about compliance early in the process of creating the subsidiary can prevent problems associated with attempting to layer the program over entrenched local practices.

A. Goals of a Compliance Program

Before designing the elements of a compliance program, it is important to understand the goals of the program and why such a program is valuable from both a legal and business perspective. Though some laws mandate corporate compliance programs, others do not. Even where they are not mandatory, however, the benefits of a compliance program can make them worth much more than their costs.

First, compliance programs can help the company avoid potential problems. Though some legal violations can be caused by the intentionally illegal conduct of some employees, many violations are caused by simple ignorance of the law. Legal principles that domestic companies take for granted may be alien to their foreign counterparts, and, frankly, many domestic laws are not intuitive even to domestic employees. Culturally, there may be resistance to following compliance rules required by a foreign parent unless the benefits to the subsidiary are demonstrable. A well-communicated program—and one translated into local languages—can help the company avoid legal exposure for violations that could have been prevented with effective employee education.

Second, a compliance program tailored to the company's risks can enable it to quickly detect potential violations. Early detection of potential problems can allow the company to maintain its options and can prevent small issues from metastasizing into material threats to the company.

Finally, the existence of a meaningful compliance program can be critical to demonstrate to prosecutors that any problems that are not successfully prevented occurred in direct violation of company policy and do not reflect the values of the company and management. The existence of an effective compliance program can provide an affirmative defense to some violations, result in reduced corporate sanctions, and even declination of prosecution.

B. Elements of a Meaningful Compliance Program

Though enforcers consistently tout the benefits of meaningful compliance programs, they often are vague about the specific policies, procedures, and controls that should be implemented. This does not arise from an intent to "hide the ball," but rather a recognition that compliance programs necessarily vary by the size of a company, its industry, and the jurisdictions in which it operates. Furthermore, compliance programs will vary, of course, based on the particular laws with which a company must comply. Nonetheless, certain broad principles are often applicable when evaluating whether a compliance program is "meaningful."

1. Tone at the Top

One of the threshold questions for a company establishing a foreign subsidiary is whether corporate control and responsibility should be centralized or decentralized. Though there may be advantages to a decentralized structure for business reasons (e.g., multi-year earn-outs in an acquisition), the parent company should take care that it maintains a consistent "tone at the top" —a factor repeatedly cited by enforcers when assessing the value of a company's compliance program.[15]

Though "tone at the top" can seem like a nebulous concept, it can be demonstrated through clear directives from senior executives that the company values compliance with the law first and foremost, and that business objectives should be achieved through means that reflect the company's values of ethics and integrity. Often, these messages should come not necessarily from the legal or compliance departments (though obviously they can be reinforced by those departments), but from the senior executives with business oversight for the employees. For example, sales executives can make sure their salespersons understand that though the company wants sales, it would rather lose sales than gain them through bribery.

"Tone at the top" should also emphasize that each employee has a personal responsibility for compliance. Meaningful compliance has to happen on the front lines of a business—it cannot be completely outsourced to the legal or compliance department of a distant parent company. Despite universal concerns over costs, this is a message best delivered in-person by senior executives traveling to the subsidiary's location.

2. Attention to Red Flags

Many companies use "risk-based" models when designing their compliance programs. When implementing a "risk-based" model, companies should consult with counsel to analyze the relevant laws applicable to their business, the particular risks of noncompliance that are especially relevant to their business model, and the risks posed by the jurisdictions in which they operate. For example, Transparency International's Corruption Perceptions Index is one tool for assessing a foreign jurisdiction's corruption risk.[16]

As another example, a medical company establishing a subsidiary in China should examine multiple laws when implementing its compliance program. In addition to local licensing and healthcare laws, the company should be mindful of recent U.S. Foreign Corrupt Practices Act prosecutions of other medical industry companies operating in China. Accordingly, the company should be aware that gifts and honoraria to physicians could pose special risk under the FCPA.[17] Moreover, certain Chinese cultural traditions, such as the giving of gifts during the Chinese New Year, should receive heightened attention in the subsidiary's compliance program.[18] Though the particular risks will vary by jurisdiction and industry, careful attention to heightened risks can help a company make the best use of limited compliance resources.

3. Appropriate Training for Employees

After identifying the particular compliance risks to the company, the company should provide localized training for employees. The training should emphasize the risks that noncompliance poses to the company and individual employees, and should help employees identify the red flags

that may indicate noncompliance. For foreign subsidiaries, it often will be necessary to translate the training materials into the local language.

Though strong statements in a company's code of conduct and internal policies are important, there is often no substitute for in-person training during the initial roll-out and hiring process. In-person training can also demonstrate the company's "tone at the top." Nonetheless, for periodic "refresher" trainings, companies often opt for online modules. These modules have the benefit of being easy for compliance officers to track and, if the foreign subsidiary's employees consistently miss certain questions, can provide indicators of the areas on which the company should focus its compliance resources. Many vendors specialize in preparing tailored online compliance training at reasonable rates. Typically, compliance materials should be translated into local languages to facilitate the training.

4. Effective Reporting System

Once employees have been trained to recognize red flags, the company should provide a means for employees to report potential red flags to the company itself. The reporting system should enable employees to make confidential and (if the employee desires) anonymous reports to appropriate personnel, unless local laws restrict the use of such reporting systems. Many companies provide telephonic, email, and online reporting options for employees, and, for foreign subsidiaries, companies often ensure that any report can be handled in the appropriate local language. Furthermore, it is important to have mechanisms to bypass alleged wrongdoers in the reporting chain. For example, if a report potentially implicates the head of internal audit, the existence of the report should not be disclosed to that person, even if reports would normally flow through that office. As with online training modules, there are numerous vendors that specialize in creating and maintaining effective reporting systems.

The company should have a clear policy prohibiting retaliation against whistleblowers. Many laws prohibit retaliation against whistleblowers.[19] Perhaps more importantly, however, the company should encourage a culture in which employees with credible information about noncompliance are comfortable reporting their concerns within the company, rather than an environment where the fear of reprisal leads a whistleblower to immediately report the information to prosecutors. As discussed in more detail in Section III(B)(5) below, the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act provides ample reason to encourage employees of issuers to report internally before reporting to the Securities & Exchange Commission. You should also be prepared to deal with customs and norms regarding whistleblowers, many of which may differ significantly from those in the U.S.

5. Thorough Investigations of Credible Reports and Red Flags

Encouraging reporting through the company's internal reporting program can be expected to lead to an increase in whistleblower reports. Crafting appropriate and thorough responses to reports of alleged violations can be time-consuming, but is one of the most important aspects of an effective compliance program. Delayed or insufficient responses to reports of wrongdoing can undo much of the work that a company has invested in training its employees, implementing internal controls and establishing a reporting line.

The elements of effective internal investigations are discussed in more detail below, but in the wake of the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), it is especially important for issuers to consider the company's procedures for responding to reports of wrongdoing. In addition to anti-retaliation provisions, Dodd-Frank provides the potential for substantial monetary awards for individuals who report "original information" relating to a violation of the securities laws to the Securities & Exchange Commission ("SEC"). These awards are expected to greatly increase whistleblower reports to the SEC. Accordingly, it is more important than ever for public companies to create incentives for potential whistleblowers—whether foreign or domestic—to report their allegations to the company.

Because of Dodd-Frank, many companies are reviewing their reporting systems and their methods for handling whistleblower reports. In August 2011, the SEC's final rules relating to the whistleblower awards under Dodd-Frank went into force. Under the final rules, if a whistleblower reports a violation internally, the whistleblower must report the violation to the SEC within 120 days from the date of the internal report to be eligible for a monetary award.[20] Furthermore, if 120 days have elapsed since an officer (including a compliance officer), director, trustee, or partner informed the company's audit committee, chief legal officer, or chief compliance officer, that person may become a whistleblower—even if he or she received the information from another person.[21]

Finally, the SEC will not treat information covered by the attorney-client privilege as "original information," assuming it does not fall within narrow exceptions.[22] Accordingly, this is an additional reason why it is important to recognize that the work of your company's internal auditors and other non-counsel employees and vendors may be covered by the U.S. attorney-client privilege or work product doctrine only if their work is undertaken at the direction of counsel. Also, as discussed in Section III(D)(2) below, the extent of attorney-client privilege protection that applies, if any, can vary dramatically depending on the foreign jurisdiction. As a result, it is important to determine what protections apply before communicating sensitive information into a foreign jurisdiction.

These provisions of the SEC's final rules provide additional incentives for companies to quickly respond to whistleblower allegations and to involve counsel early in the process. Many companies are considering offering internal rewards and recognition to whistleblowers who promptly report credible allegations of violations of the securities laws to the company's internal compliance resources. Finally, you should consider whether the reporting mechanisms for foreign offices and employees need to be tailored to take into account communication methods that will be most effective locally and are consistent with local laws. For example, online reporting is unlikely to be useful if most employees lack computer access or your ethics hotline does not include a toll free number that works locally.

6. Remedial Measures

Even the best compliance programs cannot prevent every violation. Furthermore, even excellent compliance programs often cannot predict the methods that unscrupulous employees will use to evade the company's internal controls. Accordingly, if a report of wrongdoing is substantiated, it is extremely important to undertake appropriate remedial measures to correct the violation. Failure to implement effective remedial measures can cause employees to lose faith in the reporting process; wrongdoers (and their colleagues) to believe that their conduct is acceptable;

and enforcers to conclude that a company has only a "paper" program and that the "tone at the top" is lax at best.

After concluding an investigation where wrongdoing has been substantiated, one of the most common issues is determining what discipline to mete out to offenders. Clearly, sanctions may vary depending on the culpability and extent of the conduct; for example, internal audit personnel who negligently approved improper expenses often should not receive the same punishment as the sales representative who used the expenses to provide a kickback to a physician. Regardless of the level of the sanction, however, it is critical to consider applicable labor laws and any employment contract with the wrongdoing employee.

In addition to employee discipline, the company should also consider any appropriate changes to its internal controls and procedures. If the wrongdoing was caught by another employee without responsibility for internal controls, the company should analyze any gaps in the controls. Similarly, if the investigation indicates that employees misunderstood company policy or applicable law, the company should promptly provide additional training on the particular policy or law to all relevant employees.

Remember that actions speak louder than words—particularly when you are thousands of miles away from compliance officers. In the international context, consistency and seriousness of purpose are critical to ensuring an effective compliance program.

7. Monitoring and Periodic Testing

The conclusion of an investigation can provide an opportunity for a company to assess its compliance program. Many companies also engage in regular monitoring and periodic audits to test their controls and employees' compliance awareness. Depending on the structure of the company, internal audit, compliance office, or outside counsel resources can be deployed to conduct spot checks of controls, conduct a forensic review of a sample of transactions, and interview line-level employees to discuss compliance efforts at the foreign subsidiary. When problems are discovered, it is important to quickly involve counsel so that applicable attorney privileges can be used to protect any ensuing investigation.

Engaging foreign managers in the audit process can be an excellent opportunity for both the company and the managers. The company will benefit from a different perspective, and the managers will have a chance to both better understand the compliance regime and impress headquarters with their diligence on an important corporate objective. Companies should consider making this an integral aspect of their promotion scheme, just as they consider foreign assignments crucial to moving into the executive ranks.

8. Acquisition and Joint Venture Due Diligence

As the foreign subsidiary expands its business, other companies may become attractive acquisition or joint venture candidates. In addition to business and financial due diligence, however, the subsidiary should engage in robust compliance due diligence.

Due diligence on foreign acquisitions often should include the following steps:

- A review of the target's compliance policies, internal controls, and agreements with third parties;
- A review of the target's previous reports of wrongdoing, and the results thereof;
- Interviews with compliance, executive, and sales personnel;
- A forensic review of data room financials and auditors' reports; and
- A review of how the target's business is generated, who in the target generates business, and whether the methods of obtaining and retaining business are in accordance with both U.S. law and the law of the jurisdiction. This component is sometimes overlooked.

Due diligence on potential joint venture partners may not be possible to the same extent; however, many law firms and vendors provide confidential due diligence on potential joint venture partners. This confidential due diligence can both flush out potential problems and, if no problems are discovered, demonstrate a commitment to compliance in the event of an enforcement action based on the joint venture partner's later violations. Additionally, the acquisition or joint venture agreement should contain representations and warranties of compliance with both local law and U.S. laws that apply extraterritorially (e.g., the FCPA). Because companies often have less control over joint venture relationships, the joint venture agreement should clearly set forth the compliance obligations of the joint venture.

After acquiring an entity, the foreign subsidiary should swiftly integrate the acquisition into the company's compliance program. As with the original establishment of the foreign subsidiary, the new acquisition should implement appropriate controls and reporting mechanisms and provide appropriate training to the acquisition's employees. Similarly, with joint ventures, the foreign subsidiary should work with its joint venture partner to implement the compliance policies and procedures set forth in the joint venture agreement.

C. Specific Areas of Compliance

A wide range of laws applies to international businesses and to foreign subsidiaries of U.S. companies. Furthermore, local laws inherently vary significantly by jurisdiction. Though the particular areas that should be addressed by a risk-based compliance program necessarily will depend on both the jurisdiction and the industry of the foreign subsidiary, several laws are broadly applicable to many U.S. companies doing business internationally.

1. The U.S. Foreign Corrupt Practices Act[23]

The U.S. Foreign Corrupt Practices Act ("FCPA") is a federal law that can be broadly divided into two sets of provisions:

- ***Anti-Bribery*** – As interpreted by U.S. authorities, these provisions prohibit companies and individuals from offering or providing anything of value to any foreign official for the purpose of corruptly influencing the decision of that official to do anything that assists the offeror in the obtaining or retaining of business. Enforcers have broadly interpreted many of the statutory terms, such as "anything of value" and "obtaining or

retaining of business." Furthermore, enforcers have construed "foreign official" to include employees of state-owned enterprises.

- ***Books and Records and Internal Controls*** – These provisions require issuers to maintain a system of internal controls that provides reasonable assurances that, among other things, transactions "are executed in accordance with management's general or specific authorization" and are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles and to maintain accountability for assets. Issuers must also "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." Unlike the U.S. Sarbanes-Oxley Act, there is no materiality threshold to find an FCPA books-and-records violation.

As to both kinds of violations, the SEC has jurisdiction over civil enforcement actions against issuers or their employees or agents. Concurrently, the Department of Justice ("DOJ") has jurisdiction over criminal investigations and prosecutions against all culpable individuals or companies as to both kinds of violations. Not infrequently, the SEC and DOJ conduct "parallel" civil and criminal investigations of the same conduct allegedly violative of the FCPA.

Importantly, a company can be held liable for the conduct of its employees, subsidiaries, joint venture partners and third-party agents. A defendant can be held liable for the acts of its agents when it is "aware of a high probability" that its agent or joint venture partner has bribed a foreign official—even if the defendant has no actual knowledge itself.[24] The DOJ may consider defendants to have been "aware of a high probability" of bribery if the defendants ignored red flags, including "unusual payment patterns or financial arrangements, a history of corruption in the country…, apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer."[25] Accordingly, to avoid being held liable for the acts of their agents, many companies engaging international business will conduct anti-corruption due diligence and background checks on their agents, and will insert robust anti-corruption terms into the agents' retention agreements.

Finally, FCPA issues sometimes arise during mergers and acquisitions. Successor liability can be devastating for companies that fail to conduct appropriate FCPA due diligence on targets, fail to include appropriate contractual terms, or fail to ensure that new management shares the acquirer's commitment to compliance. For example, in 2009, FCPA violations discovered by eLandia after its purchase of Latin Node led eLandia to write down most of its $26.8M purchase price.[26]

a. The Anti-Bribery Provisions

The elements of a bribery violation are: (1) the payment (or offer of); (2) anything of value; (3) to any foreign official, foreign political party official, candidate for foreign office or any other person, while knowing that all or part of the payment will be passed on to one of the above; (4) "corruptly;" (5) for the purpose of obtaining or retaining business for or with any person. Many of these elements are more ambiguous than they may initially appear:

- "Anything of Value": The FCPA prohibits both actual bribes, as well as unaccepted offers, of "anything of value." In addition to straightforward cash payments, enforcers

have broadly construed this term to include lavish travel expenses, entertainment expenses, and jobs for relatives of officials.

- "Obtaining or Retaining Business": This has also been broadly construed and is rarely the focus of arguments against liability. In one of the few U.S. Circuit Courts of Appeals decisions interpreting the FCPA, the Fifth Circuit held that making payments to officials to reduce customs expenses and taxes could constitute a violation of the FCPA.[27] The court was not persuaded by the defendants' argument that the payments merely lowered the company's tax burden.[28]
- "Foreign official": Perhaps most significantly, enforcers have broadly construed the term "foreign official" to include positions that many businesspeople may not understand to be government officials. For example, physicians in state-run hospitals have been considered "foreign officials" under the FCPA.[29] Since January 2011, however, defendants in three criminal FCPA cases have challenged the DOJ's definition of the term. While some additional judicial guidance has been provided, the DOJ still defines the term expansively.[30]

  Additionally, the statute explicitly prohibits improper payments to "political party officials." In countries like China, where many prominent businesspersons are also members of the Communist Party, reimbursement to such foreign businesspersons of otherwise legitimate expenses may violate the FCPA because "political party officials" are considered "foreign officials" under the statute.
- "Corruptly": Though the FCPA anti-bribery provisions prohibit only conduct made with "corrupt" intent, enforcers frequently rely on circumstantial evidence to establish the intent element. The FCPA provides an affirmative defense where the offer or provision of anything of value to a foreign official is "reasonable and bona fide" and directly related to "the promotion, demonstration, or explanation of products or services." Accordingly, entities and individuals can better establish this affirmative defense (and/or negate the intent element) by ensuring that any offers of anything of value to foreign officials are bona fide, reasonable, and for the express purpose of promoting, demonstrating, and explaining their products and services. Properly documenting any such offers or expenses can enable companies or individuals to better respond to an investigation, even if FCPA allegations arise years later.

b. The Accounting Provisions

The accounting provisions of the FCPA impose two duties on issuers: recordkeeping and internal accounting controls. The recordkeeping provisions require every issuer to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." This requirement applies to all transactions, foreign and domestic, and there is no materiality standard for violations.

Issuers are required to include both qualitative and quantitative detail, including details that would alert a reader to potential illegality. In a well-known case, a company was found liable for bribes paid to, among others, the manager of a private steel mill.[31] The DOJ and SEC charged the company with a violation of the recordkeeping provisions, because the bribes were inaccurately recorded as "sales commissions" or "rebates." Recording the bribes as, quite literally, "bribes," would have been the only qualitative detail even arguably sufficient to satisfy the recordkeeping provisions of the FCPA.

The FCPA also requires public companies to maintain adequate internal accounting controls. Issuers must "devise and maintain a system" that "provides[s] reasonable assurances that . . . transactions are executed in accordance with the management's general or specific authorization."[32] Transactions must provide "reasonable assurances" that:

- Transactions are executed, and access to assets is permitted only according to management's authorization;
- Transactions are recorded as necessary to (i) permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements and (ii) to maintain accountability for assets; and
- The recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

The records must be sufficient to "satisfy prudent officials [as it would in] the conduct of their own affairs."[33]

c. The Consequences of an FCPA Enforcement Action

The costs of responding to a government FCPA investigation often dwarf any penalties that the government assesses. For example, Siemens' attorneys and auditors expended over 1.5 *million* hours of billable time during the investigation.[34] Furthermore, FCPA indictments have a way of metastasizing, as well; conduct that violates the FCPA may also trigger mail, wire, and tax fraud charges, as well as charges under the Travel Act, which federal enforcers increasingly have used to prosecute commercial bribery.

The actual penalties that can be imposed for FCPA violations are severe. The following maximum penalties are prescribed for bribery violations:

Penalty	**Corporation**	**Individual**
Criminal	■ USD $2 million *per violation*, or twice the gain or loss resulting from the illegal payment ■ Debarment (administrative)	■ USD $100,000 *per violation*, or ■ 5 years in prison *per violation*, or ■ Both Fines are not reimbursable by the corporation. ■ Debarment (administrative)
Civil	USD $10,000 per violation	USD $10,000 per violation

For books-and-record and internal control violations, the following maximum criminal penalties are prescribed:

Penalty	Corporation	Individual
Criminal	■ USD $25 million *per violation*, or twice the gain or loss resulting from the illegal payment ■ Debarment (administrative)	■ USD $5 million *per violation*, or ■ 20 years in prison *per violation*, or ■ Both ■ Debarment (administrative) Fines are not reimbursable by the corporation.

2. The U.S. Sarbanes-Oxley Act

The U.S. Sarbanes-Oxley Act of 2002 ("SOX") made sweeping changes in the law governing public companies and covers many aspects of corporate governance, public company disclosure obligations, and related securities law enforcement activities. In addition, SOX established a new regulatory system for accounting firms that audit companies filing financial reports with the SEC.

The provisions of SOX apply to companies that are required to file periodic reports under the Securities Exchange Act of 1934 (the "Exchange Act") or that have filed a registration statement under the Securities Act of 1933 (the "Securities Act") that has not yet become effective and that has not been withdrawn.

a. Corporate Responsibility

SOX requires CEOs and CFOs to make two separate certifications (the "906 Certification" and the "302 Certification") concerning reports filed with the SEC. Both of these certifications are required in connection with a public company's quarterly and annual reports. The 906 Certification imposes criminal penalties for violations while the 302 Certification imposes civil penalties. SOX increases the responsibilities placed on audit committees and created greater accountability of outside auditors to audit committees. SOX prohibits providing or arranging for (or modifying) company loans to directors and executive officers with very limited exceptions. CEOs and CFOs are liable to their companies for bonuses, other incentive compensation, and stock sale profits following accounting restatements based on "misconduct," including misconduct by others in the company. SOX places a ban on trading by directors and executive officers in a public company's stock during pension fund blackout periods.

b. Auditor Oversight and Independence

SOX significantly increased federal regulation of the audit process, including the establishment of a Public Company Accounting Oversight Board (the "PCAOB") to regulate accounting firms in providing audit services to public companies. The five-member PCAOB issues rules for auditing, quality control, and ethical standards for public accounting firms and has the authority to inspect, investigate, and sanction public accounting firms. Only accounting firms registered with the Oversight Board are able to perform audits of public companies. Specific independence provisions in SOX do the following:

- Restrict registered public accounting firms (i.e., firms registered with the PCAOB) from providing non-audit services to public companies,
- Mandate rotation of the lead audit partner for a public company,
- Prohibit improper influence on audits by officers and directors, and
- Require timely reports to the audit committee on certain matters by the outside auditor.

Dodd-Frank amended SOX to require that brokers and dealers be audited in accordance with PCAOB standards by a PCAOB member.

Dodd-Frank also amended SOX to require more accountability from foreign audit firms. Any foreign public accounting firm that performs material services upon which a registered public accounting firm relies in the conduct of an audit or interim review, is required to produce its audit work papers and any other relevant documents to the SEC or the PCAOB upon request. Additionally, any public accounting firm that relies on a foreign audit firm in using an audit report, performing audit work, or conducting an interim review is required to (i) produce the same documents to the SEC or the PCAOB upon request and (ii) obtain the agreement of the foreign public accounting firm to produce such documents as a condition of relying on the foreign firm's work.

Any foreign public accounting firm that performs work for a domestic registered public accounting firm must furnish to the domestic firm a written irrevocable consent and power of attorney that designates the domestic firm as an agent who may be served any request by the SEC or PCAOB under this section or legal papers in any action to enforce this section of SOX. If a foreign public accounting firm does work upon which a registered public accounting firm relies, the foreign firm must designate to the SEC or PCAOB an agent in the U.S for the same purposes.

c. Enhanced Public Disclosures

Section 16 insiders are required to report transactions involving company securities within two business days. Public companies are required by SEC rules to disclose all material off-balance sheet transactions, and to present pro forma financial information included in periodic and other reports filed with the SEC or press releases in a manner that is not misleading. SOX authorized the SEC to require public companies to disclose material changes "in plain English" on a "rapid and current basis." The SEC is required to review the reports (including the financial statements) of listed companies at least once every three years.

d. Whistleblower Protection

SOX protects employees of public companies against retaliatory discharge or other adverse employment action for providing information or otherwise assisting in investigations by governmental agencies, the members of Congress, or a supervisory authority over the employee involving alleged violations of the securities laws, SEC regulations, or securities fraud. Dodd-Frank clarifies that the retaliation provisions of SOX cover employees of subsidiaries and affiliates of public companies whose financial information is included in the consolidated financial statements of such public company.

e. Enforcements and Penalties

Attorneys who represent reporting companies are required, pursuant to rules adopted by the SEC, to report evidence of material violations of securities laws or breaches of fiduciary duty to the company's chief legal counsel or CEO, and, if necessary, to the audit committee or board of directors. CEOs and CFOs face up to $5 million in fines or 20 years imprisonment, or both, for willfully making knowingly false certifications of periodic reports. Criminal penalties for securities fraud include fines and maximum imprisonment of 25 years. Criminal penalties for document destruction or alteration done to impede federal investigations include fines and maximum imprisonment of 20 years.

3. Other U.S. Laws

In addition to SOX and the FCPA, a number of other U.S. laws can affect the maintenance of a foreign subsidiary.

a. Export Controls[35]

"Export controls" is a general term that can refer to a number of regulations, including:

- The regulations promulgated by the Treasury Department's Office of Foreign Assets Control ("OFAC");[36]
- The Department of Commerce's Export Administration Regulations ("EAR");[37] and
- The Department of State's International Traffic in Arms Regulations ("ITAR").[38]

These regulations are intended to protect the national security and foreign policy interests of the U.S., but they can create pitfalls for transfers and exports between U.S. companies and their foreign subsidiaries.

OFAC administers and enforces economic sanctions programs against countries and groups of individuals. OFAC regulations set forth transactions in which U.S. persons are prohibited from engaging. In 2010, companies paid over $200 million in penalties and settlements related to OFAC violations.[39] As of July 2011, OFAC administered twenty sanctions programs relating to countries including Iran, Libya, Sudan, Cuba, North Korea and others, as well as Counter Narcotics Trafficking and Counter Terrorism sanctions programs. The nature and extent of the prohibitions vary depending on the sanctions program. For some of these programs, including the sanctions program relating to North Korea, the sanctions apply to foreign subsidiaries of U.S. companies.[40]

The EAR are regulations promulgated by the Department of Commerce pursuant to the Export Administration Act of 1979 and other legal authority.[41] The EAR restrict export or re-export of certain dual-use goods, software and technology, as well as other commercial exports. The EAR define the circumstances in which an export license is necessary and the methods by which such a license may be obtained. Notably, under the anti-boycott provisions of the EAR, a "controlled in fact" foreign subsidiary of a U.S. company is considered a U.S. person and subject to the EAR.[42] The Department of Commerce promulgates Compliance Guidelines that set forth guidance to assist companies in establishing an Export Management and Compliance Program. (A copy of the Compliance Guidelines is attached as Section VI).

The ITAR implements the Arms Export Control Act and requires export licenses for certain defense-related articles and services. Because foreign subsidiaries are considered "foreign persons" under the ITAR,[43] exports of the ITAR-covered articles and services from U.S. parent companies to foreign subsidiaries may require export licenses. The Office of Defense Trade Controls Compliance (the office of the Department of State tasked with administering the ITAR) has published Compliance Program Guidelines that set forth the "[i]mportant elements of effective manuals and programs." (A copy of the Compliance Program Guidelines is attached as Section VI).

Covered articles and services under these regulatory schemes can be construed extremely broadly, covering even the discussion of improvements to an article or service with a foreign national, taking place outside the U.S. or that would likely be taken outside the U.S. by a foreign national. When dealing with technology matters, care should be taken not to run afoul of these provisions.

b. Immigration Law[44]

An L-1 visa is required for an employee of a foreign subsidiary who seeks to work temporarily for a U.S. parent company. Be aware that other local visa requirements likely would be required for employees of a U.S. parent company seeking to work for a foreign subsidiary.

c. The Committee on Foreign Investment in the United States

One little-understood aspect of international transactions is the Committee on Foreign Investment in the United States ("CFIUS").[45] CFIUS is an interagency committee of senior government officials that reviews transactions affecting the national security of the U.S. where control of a U.S. business could pass to one or more foreign persons.

CFIUS will not affect most businesses, but it is important to understand when it will be triggered. If there are national security concerns with a transaction affecting a U.S. business, the U.S. government can place conditions on the transaction or prohibit it entirely. To avoid this, parties entering into a transaction can file a notice to obtain clearance and fit into a compliance safe harbor. National security is a broadly defined subject area, and companies that have been subject to review include oil companies, defense companies, ports, and other entities that might not immediately be considered as subject to a national security review.

If your client is a U.S. business, CFIUS may not affect your creation of a foreign subsidiary, unless a proposed transaction includes properties in the U.S. that are exchanged with a foreign party. If your client is a foreign business contemplating a transaction in the U.S., however, CFIUS should be a consideration. You should also consider the implications on the back end of any investment in

which it may be necessary to remove technology or intellectual property or implement a transaction swap with foreign involvement.

4. The U.K. Bribery Act 2010

Though passed in 2010, the U.K. Bribery Act came into force on July 1, 2011. It is more stringent than the FCPA in several key respects and imposes strict corporate criminal liability for business organizations that fail to prevent their "associated persons" (including employees and agents) from violating the U.K. Bribery Act. Like the FCPA, the U.K. Bribery Act applies extraterritorially. The U.K. Bribery Act can apply to the worldwide conduct of those acting on behalf of entities that carry on business in the United Kingdom. Importantly, the U.K. Bribery Act specifically prohibits bribery of both government officials and private citizens. Like the FCPA, the U.K. Bribery Act provides for severe penalties for companies and individuals who violate its terms.

The U.K. Bribery Act provides an affirmative defense of "adequate procedures" for business organizations accused of failure to prevent bribery. The U.K. Ministry of Justice ("MOJ") has published guidance interpreting "adequate procedures," a key term in the Bribery Act. Though the MOJ's guidance is not intended to be a "one-size-fits-all document," it provides useful principles and illustrative examples that can help guide companies in tailoring their compliance programs to their size and risk profiles. Many observers have also focused on the hospitality section of the MOJ's guidance. The MOJ listed a number of factors that it will consider when determining whether hospitality rises to the level of a violation of the Bribery Act, including "the type and level of advantage offered, the manner and form in which the advantage is provided, and the level of influence the particular foreign public official has over awarding the business." The U.K. Serious Fraud Office and the Director of Public Prosecutions also have published joint guidance interpreting key terms in the Bribery Act.

5. Foreign Local Law

Though the FCPA, Sarbanes-Oxley and export controls often are critical aspects of a compliance program, the company should not overlook the importance of local laws when designing its foreign subsidiary's compliance program. Not only is compliance with local law mandatory for the operations of the foreign subsidiary, in many cases, the U.S. company can address the perception of legal or cultural imperialism mentioned previously by stressing compliance with local laws in addition to the law of the company's headquarters. For example, many activities that would run afoul of the FCPA would also violate the foreign country's prohibitions on commercial or public bribery.

Though local laws will vary, of course, several areas of law are often hot spots for U.S. companies establishing foreign subsidiaries.

a. Labor and Employment

First, labor and employment laws in other jurisdictions often offer significantly greater employee protections than comparable U.S. laws. For example, the constitution of Morocco guarantees the right to strike, and provisions in Morocco's Labor Code prohibit employers from hiring substitute workers during a strike.[46] In Thailand, unless there is narrowly defined "cause" for termination, employees without a specified term of employment are legally entitled to advance notice of

termination and statutorily mandated severance pay.[47] Considering local labor law when building a foreign subsidiary's compliance program can prevent the company from later encountering tension between local employment protections and a disciplinary action mandated by a poorly-conceived compliance document. A company that is forced to disregard its own compliance program in deference to local law risks both undermining the effectiveness of the program and having an awkward story to tell U.S. enforcers in the event of a violation of U.S. law.

b. Data Privacy

Many jurisdictions offer employees more robust data privacy protections than the United States, even where the employee is using devices and networks owned and controlled by the company. When operating internationally, U.S. companies commonly—and mistakenly—assume that the foreign jurisdiction's data privacy laws will mirror the relatively lax protections of the United States. Insufficient attention to data privacy protections can create major issues in cross-border internal investigations.

Perhaps the most well-known example of robust data privacy protection is the European Union Directive on Data Privacy (the "Directive"), which provides significant protections relating to the "processing of personal data"—a term which, in some cases, may include even the storage of information on company servers.[48] Moreover, transfer of personal data from a foreign subsidiary to the United States can cause potential compliance problems. In 2000, the European Commission stated that member states "are required to provide that the transfer of personal data to a third country may take place only if the third country in question ensures an adequate level of protection."[49]

U.S. companies seeking to receive personal data transfers from EU countries must demonstrate that they can ensure "an adequate level of protection," as determined by reference to the EU's six privacy principles: notice, choice, onward transfer, security, data integrity, access, and enforcement.[50] In consultation with the European Commission, the U.S. Department of Commerce has developed a "safe harbor" framework, which can provide participating U.S. organizations with a streamlined means to comply with the Directive.[51]

c. State Secrets Law and Local Legal Representatives

When gathering information from a foreign subsidiary, it is important to ensure that the company has considered whether authorization from a locally registered company official is required and whether local state secrets or national security laws could apply. For example, businesses seeking to retrieve information from their Chinese subsidiaries should be wary of running afoul of the Law on Guarding State Secrets (the "State Secrets Law"). Passed in 1988 and revised in 2010, the State Secrets Law prohibits the unlawful copying, recording or storage of seven categories of information, including secret matters in national economic and social development; secret matters concerning science and technology; and any other secrets determined by the National Administration for the Protection of State Secrets. Critically, this final catch-all provision means that many companies may not realize that information they are seeking to export from their subsidiaries may be classified as a "state secret" under the law.

Additionally, for companies seeking to remove data from local sites in China, the authorization of the legal representative, as expressed through the use of the company chop, may be required. Without this authorization, even the parent company may be barred from removing data from

local sites in China or, in some cases, even accessing the premises. Accordingly, parent companies should take care in selecting their subsidiaries' legal representatives and should ensure that they maintain adequate controls over access to the company chop.

d. Mandatory Reporting Obligations

Finally, many jurisdictions require companies to report certain "suspicious transactions," potentially including violations committed by the companies themselves. For example, Singapore law requires a disclosure to the Suspicious Transaction Reporting Office if a person "knows or has reasonable ground to suspect that any property . . . was used in connection with any act which may constitute . . . criminal conduct."[52] In Hong Kong, if a person knows or suspects that any property was used in connection with an indictable offence, the person is required to report the knowledge or suspicion to an authorized Hong Kong officer.[53] An understanding of any mandatory reporting requirements in a local jurisdiction can shape the structure of a compliance program, including the procedures for responding to potential compliance violations.

D. Cross-Border Internal Investigations

Some principles of domestic internal investigations will remain the same, even when dealing with a foreign subsidiary—assembling the proper team of investigators (including legal, forensic audit, and technological resources) is important, as is taking care to protect the attorney-client privilege where it is applicable. The cross-border nature of many internal investigations related to foreign subsidiaries can raise special issues.

Responding to whistleblower reports from a foreign subsidiary can introduce even more complexities than other internal investigations. First, the report frequently will be in the local language and need translation for U.S.-based compliance resources. Second, cultural sensitivities are also important to understand. The strong tradition of whistleblowing in some countries, such as China, should be considered when evaluating reports from the country. Whistleblowers at foreign subsidiaries may have different expectations, and be subject to different protections, than their domestic counterparts.

1. Evidence Gathering

Once an investigation has been initiated, gathering information from a foreign subsidiary can prove challenging. As discussed above, many jurisdictions, through data privacy, labor, state secrets, or other laws, place significant restrictions on companies' abilities to harvest email and other documents that potentially contain employees' personal data or sensitive information. Moreover, employee interviews can be even more challenging than in the United States, as both linguistic and cultural differences can complicate the information-gathering process. The early involvement of local counsel can prevent inadvertent violations of local laws and help bridge linguistic and cultural gaps.

2. Protecting Legal Privileges

Furthermore, the early retention of counsel can help protect the attorney-client privilege, as many jurisdictions do not extend the privilege to communications between an in-house attorney and his

or her employer. Historically, U.S. courts have recognized that, under certain circumstances, the attorney-client privilege extends to attorneys employed by their clients.[54] Other jurisdictions, however, do not always afford such protections for communications between in-house attorneys and their clients. For example, the European Court of Justice has held that communications between a company and its in-house counsel—even counsel admitted to the bar—are not privileged.[55] This decision was handed down after (and despite) a very robust effort by the Association of Corporate Counsel arguing that in-house counsel should be afforded the protection. Other countries, including China and Japan, do not even recognize the attorney-client privilege (though counsel may have obligations to keep communications confidential).[56] Accordingly, in-house counsel should be cautious when communicating with employees of a foreign subsidiary during an internal investigation and should think carefully about document retention implications.[57] Likewise, it is important for in-house counsel to consider the extent to which the use of investigators who are not counsel will affect the company's ability to assert the attorney-client communication privilege or work product doctrine to preserve the confidentiality of the investigation.

3. Simultaneous Investigations and Resolutions

Additionally, cross-border investigations often involve more than one business unit, as allegations may relate to an entire region. Moreover, even if the allegations do not explicitly involve multiple jurisdictions, U.S. enforcers will often want comfort that any violations of U.S. law are not occurring in other offices. In some situations, the most credible way to satisfy regulators is to conduct investigations in other offices to confirm that any wrongdoing is contained. Simultaneous deployment of several investigation teams into different jurisdictions can pose unique challenges. Because of varying local laws relating to internal investigations and data collection, the internal investigations in different jurisdictions may need to proceed on different tracks, albeit with regular communication between the teams.

Finally, if the company determines that disclosure and settlement with an enforcement or regulatory authority is warranted, the company often must face the prospect of enforcement actions in multiple jurisdictions. Such patchwork enforcement can create headaches for companies that wish to swiftly negotiate settlements but are understandably reluctant to pay multiple fines and penalties for the same conduct. The prospect of multiple enforcement actions is especially threatening in anti-corruption investigations. U.S. enforcers have aggressively prosecuted FCPA violations and other countries are increasingly prosecuting corruption as well. Perhaps most famously, U.S. and German authorities simultaneously announced that Siemens would pay fines, penalties, and disgorgement totaling approximately $1.6 billion.[58] A company that self-reports information relating to potential wrongdoing to one government should be well-aware of the risk that the information will be shared with, or become known to, enforcers in other jurisdictions also.

IV. Conclusion

From the aspects of business, professional growth, and personal interest, establishing and managing a foreign subsidiary can open up whole new worlds that many lawyers have never considered. But where there is opportunity, there is risk…and it is up to the company's lawyers to identify, manage, and minimize that risk to the extent possible.

We hope this InfoPAK[SM] has given you an understanding of the most significant concerns that face the lawyer when considering the issues raised by foreign operations and subsidiaries. Of course, much more could be (and has been) written on each of these topics. We have tried to include some basic source material to guide you, but as always a great first resource is the Association of Corporate Counsel website at www.acc.com.

As you begin to practice in the intersection of domestic and foreign law, you will find that the personalities, culture, and preconceptions of the people you interact with along the way will color the vast majority of what you do. In this respect, it is not so different than practicing domestically. But take a moment to appreciate the different culture you are faced with, including the legal and compliance regimes and how they relate to the country's history and background. It will help your understanding of the local differences and possibly help you plot a course through an uncertain sea.

For all of the authors, we have found our work on international issues to be some of the most rewarding of our careers. We hope you do as well, and hope this InfoPAK[SM] helps you make the path a little easier to navigate.

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VI. Sample Policy

Bureau of Political Military Affairs
Directorate of Defense Trade Controls
Office of Defense Trade Controls
Compliance

Compliance Program Guidelines

Comprehensive operational compliance programs include manuals that articulate the processes to be followed in implementing the company program. Important elements of effective manuals and programs include:

Organization Structure

- Organizational charts.
- Description (and flow charts, if appropriate) of company's defense trade functions.
- Description of any management and control structures for implementing and tracking compliance with U.S. export controls (including names, titles, and principal responsibilities of key officers).

Corporate Commitment and Policy

- Directive by senior company management to comply with Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR).
- Knowledge and understanding of when and how the AECA and ITAR affect the company with ITAR controlled items/technical data.
- Knowledge of corporate internal controls that have been established and implemented to ensure compliance with the AECA and ITAR.

  Examples of detail:
  - Citation of basic authorities (AECA, ITAR).
  - Identification of authorized U.S. Government control body (Directorate of Defense Trade Controls ("DDTC")).
  - Corporate policy to comply fully with all applicable U.S. export control laws and regulations.

- Compliance as a matter for top management attention that needs adequate resources.
- Identification, duties, and authority of key persons (senior executives, empowered officials) for day-to-day export/import operations and compliance oversight.
- Corporate Export Administration organization chart.
- Operating Division Export Administration flow chart.

Identification, Receipt and Tracking of ITAR Controlled Items/Technical Data

- Methodology used, specifically tailored to corporate structure, organization, and functions, to identify and account for ITAR controlled items/technical data the company handles (trace processing steps of ITAR controlled transactions from the time the company manufactures/receives the item to the time an item is shipped from the company – or in the case of a defense service, when provided).

  Examples of questions to be addressed:
  - Are appropriate employees familiar with the AECA and ITAR and related requirements, including handling export approvals with certain provisos and limitations?
  - Are company employees notified of changes in U.S. export control restrictions, and are they provided accurate, reliable interpretation of U.S. export control restrictions?
  - What U.S. origin defense articles are manufactured/received by the firm and from whom? How identified and "tagged"?
  - What U.S. origin technical data related to defense articles are produced/received by the firm and from whom? How identified and tagged"?
  - What items are manufactured by the firm using U.S. origin technical data? How identified and "tagged"?
  - What items or articles are manufactured by the firm that incorporates U.S. origin defense articles (components)? How identified and "tagged"?
  - What kind of recordkeeping system does the company maintain that would allow for control of, and for retrieval of information on, U.S. origin technical data and/or defense articles exported to the company?

Re-Exports/Retransfers

- Procedures utilized to (a) obtain written State Department approval prior to the retransfer to a party not included in a State Department authorization of an item/technical data transferred or exported originally to the company, and (b) track the re-export or re-transfer (including placing parties on notice that the proposed transfers involve US origin products and labeling such products appropriately).

    - Procedure when an ITAR controlled item/technical data is transferred by the company to a foreign national employed at the company.
    - Procedure when an ITAR controlled item/technical data is transferred by the company to a foreign person within the U.S.
    - Procedure when ITAR controlled technical data or defense articles are transferred from the company to a foreign person outside of the U.S.
    - Procedure when an ITAR controlled item/technical data is to be used or transferred for an end-use not included in the State Department authorization.

Restricted/Prohibited Exports and Transfers

- Procedure for screening customers, carriers, and countries.
- Screening procedure for high-risk transactions to combat illegal exports/retransfers.
- Procedures to investigate any evidence of diversion or unauthorized use of U.S. origin products.

Recordkeeping

- Description of record systems concerning U.S. origin products.
- Procedures for maintaining records relating to U.S. origin products for five years from the expiration of the State Department license or other approval.
- Regular internal review of files to ensure proper practices and procedures by persons reporting to top management.

Internal Monitoring

- Perform audits periodically to ensure integrity of compliance program.
- Emphasis on validation of full export compliance, including adherence to license and other approval conditions.
- Measurement of effectiveness of day-to-day operations.

- Adopt procedure for highlighting any compliance areas that needs more attention.
- Report known or suspected violations to Corporate export administration office.
- Effective liaison and coordination with Ombudsman.*

  Examples of detail:
  - Specific description of procedures (examination of organizational structure, reporting relationships, and individuals assigned to export/import controls process.
  - Random document review and tracing of processes.
  - Review of internal recordkeeping, communications, document transfer, maintenance and retention.
  - Conclusion and report of violations to Corporate Export Administrator.
  - Coordination with Ombudsman.

Training

- Explanation of company training program on U. S. export control laws and regulations.
- Process to ensure education, training, and provision of guidance to all employees involved on exports (including those in departments such as Traffic, Marketing, Contracts, Security, Legal, Public Relations, Engineering, Executive Office).

Violations and Penalties

- Procedures for notification of potential violations, including use of voluntary disclosure and Ombudsman to report any violation of the company's internal control program or U.S. export controls.
- Emphasis on importance of compliance (to avoid jeopardizing Corporate business and severe sanctions against the Corporation and responsible individuals).
- Description of AECA/ITAR penalties.
- Written statements and procedures to foster employee discipline (e.g., keying certain types of advancement to compliance understanding and implementation, and establishment of internal disciplinary measures).

VII. Additional Resources

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"Strategic Alliances: Opportunities and Issues in the Current Economic Climate," ACC Presentation (Oct. 2009), *available at* http://www.acc.com/legalresources/resource.cfm?show=739250.

"Parents & Subs: Avoiding Pitfalls in Dealings Between Affiliates," ACC Presentation (Oct. 2007), *available at* http://www.acc.com/legalresources/resource.cfm?show=19939.

"Opening Offices in Foreign Countries: The Nuts, Bolts, & Pitfalls," ACC Presentation (Apr. 2004), *available at* http://www.acc.com/legalresources/resource.cfm?show=20466.

"The Counsel's Role in the Ethics & Compliance Programs," ACC Presentation (Oct. 2009), *available at* http://www.acc.com/legalresources/resource.cfm?show=736638.

4. Quick References

"Executive Mobility – Transferring Employees Between Countries," ACC QuickCounsel (Sept. 2009), *available at* http://www.acc.com/legalresources/quickcounsel/emootus.cfm.

"Selecting and Managing International Law Firms," ACC QuickCounsel (June 2009), *available at* http://www.acc.com/legalresources/quickcounsel/smilf.cfm.

"Top Ten UK Immigration Tips: Employing a non-EEA National in the United Kingdom," ACC Top Ten (Apr. 2011), *available at* http://www.acc.com/legalresources/publications/topten/UK-Immigration-Tips.cfm.

"Establishing an Enterprise in Vietnam," ACC QuickCounsel (Sept. 2011), *available at* http://www.acc.com/legalresources/quickcounsel/eaeiv.cfm.

5. Sample Forms & Policies

"Executive Expatriate Agreement (Sample #2)," ACC Form & Policy (Feb. 2008), *available at* http://www.acc.com/legalresources/resource.cfm?show=638077.

"Export Control Compliance," ACC Form & Policy (Jan. 2009), *available at* http://www.acc.com/legalresources/resource.cfm?show=854337.

"Collaboration Agreement," ACC Form & Policy (May 2010), *available at* http://www.acc.com/legalresources/resource.cfm?show=929775.

B. Outside Resources

United States Department of Justice, *Lay-Person's Guide to the FCPA*, http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.

Business Anti-Corruption Portal: http://www.business-anti-corruption.com/

Office of Foreign Assets Control: http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx

Lex Mundi: www.lexmundi.com

Bass, Berry & Sims PLC foreign anti-corruption compliance and investigations resources: www.bassberry.com/FCPA; and international trade resources: www.bassberry.com/international

VIII. Endnotes

[1] The easiest way to find out basic visa information is to visit the website of the country your team wishes to visit. *See, e.g.*, http://www.ukba.homeoffice.gov.uk/visas-immigration/do-you-need-a-visa/. The U.S. State Department also has information on their website for Americans traveling abroad, http://travel.state.gov/visa/americans/americans_1252.html.

[2] For a complete discussion of the FCPA and Global Anti-Corruption laws, see "The Foreign Corrupt Practices Act and Global Anti-Corruption Law," ACC InfoPAK (Dec. 2010), *available at* http://www.acc.com/legalresources/resource.cfm?show=1245470; "Foreign Corrupt Practices Act, and the OECD Convention on Combating Bribery of Public Officials in International Business Transactions," ACC QuickCounsel (Jan. 2010), *available at* http://www.acc.com/legalresources/quickcounsel/cbopoiib.cfm.

[3] Roger McCrary and Kenneth G. Weigel, "Compliance Programs for Importing and Exporting," *ACC Docket 25, No. 7 (Sept. 2007): 28, available at http://www.acc.com/legalresources/resource.cfm?show=14460*; "Distribution Agreements," ACC Presentation (Oct. 2008), *available at* http://www.acc.com/legalresources/resource.cfm?show=143759; "Primer on International Trade Laws," ACC Presentation (Oct. 2009), *available at* http://www.acc.com/legalresources/resource.cfm?show=740185.

[4] And if that last phrase didn't cause you to sit up a little straighter, you probably need to brush up on the Foreign Corrupt Practices Act, the UK Bribery Act and the vastly increased attention (and fines) being paid in this area. For more information on global corruption laws, please see "The Foreign Corrupt Practices Act and Global Anti-Corruption Law," ACC InfoPAK (Dec. 2010), *available at* http://www.acc.com/legalresources/resource.cfm?show=1245470.

[5] *See, e.g.*, Angelique Chrisafis, "Desperate French workers resort to kidnapping bosses to force redundancy negotiations," THE GUARDIAN, Mar. 26, 2009, http://www.guardian.co.uk/world/2009/mar/27/bossnapping-france-workers-fight-layoffs; David Jolly, "Taking the Boss Hostage? In France, It's a Labor Tactic," NY TIMES, Apr. 2, 2009, http://www.nytimes.com/2009/04/03/business/global/03labor.html (perhaps the most famous recent examples, where executives for 3M, Sony, Caterpillar and other companies were held hostage in a desperate attempt by French unions to negotiate the terms of layoffs and plant closings); *see also* "Employment Considerations When United States Companies Manage or Acquire Employees in Europe Or Canada," ACC QuickCounsel (Mar. 2010), *available at* http://www.acc.com/legalresources/quickcounsel/ecwuscmoaeieoc.cfm ("There is no concept of 'at will' employment in Canada or Europe. Employment is primarily structured through formal, written contracts (often mandatory in Europe) that set forth provisions regarding pay and working conditions. Also, because employment is not at will, absent 'just cause' (either spelled out in the contract or defined through labour court decisions), Canada and Europe have minimum standards for notice prior to termination."). A summary of the relevant French law, which is not atypical of the rights afforded European workers generally, can be found at: http://www.ilo.org/public/english/dialogue/ifpdial/info/termination/countries/france.htm. There are many opportunities to use these rules (or similar ones in other countries) to delay and complicate what many counsel may assume to be routine corporate activity.

[6] Paul Smith, "Comparative analysis of European holding company jurisdictions," TAX JOURNAL, Mar. 9, 2011, http://www.taxjournal.com/tj/articles/comparative-analysis-tax-jurisdictions ("European tax jurisdictions that are likely to be on your checklist of possible locations for your ultimate holding company will include Luxembourg, the Netherlands, Switzerland, Ireland, Malta and Cyprus.").

[7] *See, e.g.*, Europa, "The Schengen area and cooperation," Summaries of EU Legislation, Aug. 3, 2009, http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm ("The Schengen area and cooperation are founded on the Schengen Agreement of 1985…. The signatory states to the agreement have abolished all internal borders in lieu of a single external border.").

[8] *See, e.g.*, Don Durfee, "Insight: China's Foreign Lawyers Argue Case From the Gallery," REUTERS, Oct. 4, 2011, http://www.reuters.com/article/2011/10/04/us-china-law-idUSTRE79307T20111004 ("China, like Japan and South Korea before it, sharply curtails the work of foreign law firms, barring them -- along with any local national lawyers working for them -- from practicing Chinese law.").

[9] For example, the Lex Mundi network includes leading independent law firms in 160 jurisdictions across the globe. For more information, see the About the Authors section of this InfoPAK.

[10] "Expatriate Costs a Key Factor During Economic Downturn, Says ORC," RELOCATE MAGAZINE, http://www.relocatemagazine.com/reports-a-surveys/574-expatriate-costs-a-key-factor-during-economic-downturn-says-orc.

[11] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. TREATY DOC. NO. 99-27 (1986).

[12] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

[13] Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 303.

[14] The Protocol Relating to The Madrid Agreement Concerning the International Registration of Marks of June 27, 1989, as last revised on November 12, 2007, WIPO Pub. No. 204(E), reprinted in INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY 275 (Marshall A. Leaffer ed., 2d ed. 1997).

[15] *See, e.g.*, Attorney General Eric Holder, Remarks at the Organisation for Economic Co-Operation and Development (May 31, 2010) (transcript available at http://www.justice.gov/ag/speeches/2010/ag-speech-100531.html) ("[W]e call on businesses to change the tone at the top, to re-evaluate their compliance programs and internal controls, to find ways to encourage a culture of compliance, and to strongly consider voluntary disclosures of past violations of the law.").

[16] Transparency International, "Corruption Perceptiosn Index 2010," http://www.transparency.org/policy_research/surveys_indices/cpi/2010.

[17] *See, e.g.*, Complaint at ¶ 16, *Securities & Exchange Comm'n v. Syncor Int'l Corp.*, No. 1:02-cv-02421 (D.D.C. Dec. 10, 2002).

[18] It is only a coincidence that the ubiquitous "red envelope" should be treated as a serious red flag.

[19] *See* Section III(C)(2), *infra,* discussing the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Sarbanes-Oxley Act of 2002.

[20] *See* Securities and Exchange Commission, Release No. 34-64545, Rule 21F-4(c)(3).

[21] *See* Securities and Exchange Commission, Release No. 34-64545, Rule 21F-4 (b)(4)(v)(C).

[22] *See* Securities and Exchange Commission, Release No. 34-64545, Rule 21F-4(b)(4)(i).

[23] For extensive and in-depth treatment of the FCPA, see "The Foreign Corrupt Practices Act and Global Anti-Corruption Law," ACC InfoPAK (Dec. 2010), *available at* http://www.acc.com/legalresources/resource.cfm?show=1245470.

[24] *See* 15 U.S.C. § 78dd-1(f)(2)(B), § 78dd-2(h)(3)(B).

[25] *Lay-Person's Guide to the FCPA Statute*, United States Department of Justice (June 2001), http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.

[26] *See* Elandia International, Inc., Form 10-Q Quarterly Report (Jan. 10, 2008).

[27] *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004).

[28] *Id.* at 749.

[29] Press Release, Department of Justice, Micrus Corporation Enters Into Agreement to Resolve Potential Foreign Corrupt Practices Act Liability, Press Release 05-090 (Mar. 2, 2005).

[30] *See United States v. Carson*, No. 8:09-cr-00077-JVS (C.D. Cal.); *United States v. Noriega*, No. 2:10-cr-01031-AHM (C.D. Cal.); *United States v. O'Shea*, No. 4:09-cr-00629 (S.D. Tex.).

[31] Press Release, Department of Justice, Schnitzer Steel Industries Inc.'s Subsidiary Pleads Guilty to Foreign Bribes and Agrees to Pay a $7.5 Million Criminal Fine, Press Release 06-707 (Oct. 16, 2006).

[32] 15 U.S.C. § 78(b)(2).

[33] *Id.*

[34] *See* Sentencing Memorandum, *United States v. Siemens*, Case No. 08-00367 (D.D.C. 2008).

[35] For extensive and in-depth treatment of U.S. export controls law, see "Complying with United States Export and Sanction Laws and Regulations," ACC InfoPAK (Jan. 2010), *available at* http://www.acc.com/legalresources/resource.cfm?show=778690.

[36] 31 CFR §§ 500-599.

[37] 15 CFR §§ 730-774.

[38] 22 CFR §§ 120-130.

[39] *2010 Enforcement Information*, U.S. Department of Treasury, Office of Foreign Asset Control, http://www.treasury.gov/resource-center/sanctions/CivPen/Pages/2010.aspx.

[40] *See* 31 CFR § 510.

[41] *See* 15 CFR § 730.1.

[42] *See* 15 CFR §§ 760.1(b), 760.1(c), 760.2.

[43] 15 CFR § 120.16.

[44] For extensive and in-depth treatment of U.S. immigration law, see "Immigration Law and Employer Compliance," ACC InfoPAK (Mar. 2011), *available* at http://www.acc.com/legalresources/resource.cfm?show=1278141.

[45] *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. Department of Treasury (Mar. 12, 2008), http://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx.

[46] Constitution of Morocco, Art. 14; Morocco Labor Code, Art. 16.

[47] *See* Labour Protection Act B.E. 2541 (1998), Section 119.

[48] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L. 281) 31.

[49] 2000/520/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441), 2000 O.J. (L215)7.

[50] *Id.*

[51] *See Safe Harbor*, export.gov (Mar. 31, 2011), http://export.gov/safeharbor/.

[52] The Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act, Section 39(1) (Cap. 65A, 2000 Rev Ed).

[53] Organized and Serious Crimes Ordinance, Chapter 455, Section 25A.

[54] *See Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[55] *See* Case 155/79, *AM & S Europe Limited v. Comm'n*, 1982 E.C.R. 1575; *see also* Joined Cases T-125/03 & T-253/03, *Akzo Nobel Chemicals Ltd and Ackros Chemicals Ltd v. Comm'n*, 2007 E.C.R. II-3523.

[56] *See* PRC Code of Ethics for Attorneys; Article 23 of Lawyers Law [Law No. 205 of 1949, as amended].

[57] For an extensive survey of different jurisdictions' treatment of the attorney-client privilege for in-house attorneys, see the Lex Mundi Guide on In-House Counsel and the Attorney-Client Privilege, http://www.acc.com/advocacy/upload/Attorney_Client_update8-07.pdf

[58] Press Release, United States Department of Justice, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines,* Press Release #08-1105 (Dec. 15, 2008).